IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-385

John Franklin Davis, Jr.,

Petitioner,

v.

Mary Louise Davis

Respondent.

On Petition for Writ of Certiorari

from the Court of Appeals

State of Maryland

John F. Davis, Jr.
1629 Gamewell Road
Ednor, Maryland
20904

Pro se

For Respondent:
Judson R. Wood, Esq.
19110 Montgomery Village Ave.
Gaithersburg, Maryland 20760

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF CASES

TABLE OF REFERENCES

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion(s) of the Court of Appeals and

Court of Special Appeals of the State of Maryland as REPORTED and PUBLISHED in the official Maryland Report are set forth in Appendix, infra., pages 1a through 136a.

JURISDICTION

This Court is now dealing with a matter of major public concern. Jurisdiction of this court is invoked pursuant to 28 U.S.C. Sec. 1257(3), this being a matter which draws into question the validity of Maryland law on ground that the decisional law is repugnant to the Constitution of the United States; repugnant to Constitutional law as laid down by decisions of this court; repugnant to the Constitution of Maryland; that the law of Maryland as established by the Court of Appeals is repugnant to laws of the United States and denies rights specially set up by the Constitution. This jurisdiction is sustained by 7B J. Moore, Federal Practice J.C. 1257 (2d ed. 1974); C.A. Wright, Law of Federal

Courts Sec. 107, at pp. 491-492 (2d ed. 1970); 404 U.S. 71 (1971); 411 U.S. 677 (1973); Stanton v. Stanton 421 U.S. 7 (1975); and, Weinberger v. Weisenfeld 420 U.S. 636 (1975).

This case also draws into question validity of State Statute(s) Article 46, Declaration of Rights, Equal Rights Amendment, Maryland State Constitution; and Article 72A-Parent and Child, Maryland Code Annotated 1957, Sec. 1. (61a).

Petitioner sought judgment for the custody of his infant child which had been put in question pursuant to a divorce decree granted to Petitioner on grounds of Respondent's adultery and her total disregard for the welfare of the children. Judgment was refused by the trial court. On appeal to the Court of Special Appeals, Maryland, said order was reversed by that court which was subsequently set aside by the Court of Appeals.

A timely notice of filing petition for Certiorari to this court was filed in the Circuit

Court of Montgomery County, Holder of the Record, State of Maryland, June 30, 1977 (62a), after motion for reconsideration (64a-76a) was denied (36a) on May 31, 1977.

This matter is therefore, appropriately brought to this court by Petition for Writ of Certiorari pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves Equal Protection under the Fourteenth Amendment to the Constitution of the United States.

2. This case involves Statutory rights granted by Maryland Constitution Article 46, Declaration of Rights, Equal Rights Amendment[1] and Article 72A, Statute of Maryland Code Annotated.

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[1] Art. 46 of the Declaration of Rights of Maryland Constitution, proposed twenty-seventh amendment to the U.S. Constitution, became effective December 5, 1972, and states "Equality of rights under the law shall not be abridged or denied because of sex." The proposed Federal Constitutional amendment, ratified by thirty-five of the

QUESTIONS PRESENTED

1. Whether the Court of Appeals, after reviewing the record, erred by overruling the Court of Special Appeals decision awarding custody of youngest, minor daughter to her father; was this innocent little daughter Katherine Leigh Davis (herein called Leigh) denied her constitutional rights was well as human, legal, and moral rights by forcing her placement with a promiscuous mother thereby also denying her right to family unity with her older brother and sister in her devoted father's home. No evidence of moral unfitness, emotional instability exists against him to deny her custodial guardianship unto her father as opposed to the long string of events proven against the promiscuous mother detrimental to the child's future well-being?

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required thirty-eight states reads in part, "Equality of rights under the law shall not be denied or abridged by the U.S. or by any State on account of sex".

2. Whether the criteria established by the Circuit Court, State of Maryland, as affirmed by the Court of Appeals overriding the decision of the Court of Special Appeals which awarded custody of Leigh to the father, is erroneous and repugnant to the Federal Constitution Fourteenth Amendment, and to the Maryland State Constitution, Art. 46, a State created right guaranteeing Equal Rights and Protection assured by Art. 72A Maryland Code Annotated, statute?

3. Whether the State Legislative Acts guaranteeing male citizens Equality in the child custody sector, as established by Congress under the Equal Rights Amendment and accepted by State of Maryland, is now by the new state ruling, repugnant to the U.S. Constitution under Fourteenth Amendment guarantees of Equal Protection?

STATEMENT

Petitioner and Respondent were once husband and wife. On July 7, 1975, a decree of divorce

was entered on grounds of wife's adultery which contained the following provision:

> d. That the matter of permanent custody of the minor children of the parties; John Franklin Davis, III, age 16; Mary Jane Davis, age 14; and Katherine Leigh Davis, age 7; is hereby reserved for future decision pending receipt by the court of the Investigator's Report and Recommendation.

The parties had three children of the marriage, two girls and one boy. Subsequent to custody hearing of December 11, 1975, custody of the teenage son and teenage daughter were awarded to the father, and contrary to a highly respected professional child psychiatrist who reported and recommended to the court that the care and custody of the younger child Leigh be given to the father, yet the minor girl, age 6, was awarded to the scandalous, promiscuous mother.

Petitioner filed for custody of the children, after argument commenced December 1975, the Circuit Court entered its order, infra. 134a, pursuant to its conclusions of law and finding of facts as described at the trial (77a-80a) which awarded the two older minor children to the father and the youngest minor child to the mother. (The order also related to other matters which are not at issue before the court.)

Subsequently, petitioner appealed to the Court of Special Appeals of Maryland[2] to reverse the decision of the lower court allowing Leigh to remain with her father and her brother and sister assuring family unity, a fundamental right, in the best interest of the children.

The Court of Special Appeals agreed with petitioner that the lower court committed gross

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[2] Davis v. Davis 33 Md. App. 295, 364 A.2d 130 (1976).

error, reversed the Circuit Court decision and awarded custody to the father (38a-55a).

Respondent then petitioned the Court of Appeals, Maryland's Highest Court, for Writ of Certiorari. Said writ was granted and your petitioner answered by brief (81a-133a). Subsequently, petitioner pointed out gross errors of findings by the Court of Appeals (64a-76a). A timely notice of appeal to this court was given to the Circuit Court, holder of Record, on June 30, 1977 (62a).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Circuit Court awarded custody of the youngest minor child on grounds given (77a-80a). After giving custody to the promiscuous mother of the youngest minor child, the court said: (Transcript of December 11, 1975)

"Mrs. Davis, do you want to stand up, please.

"Mrs. Davis, I'm not going to give you a lengthy speech about your conduct. I'm sure that you're intelligent enough to know that your conduct, especially when you have young children, is not up to appropriate paternal standards..." (emphasis supplied)

The federal questions arise from the decision to award custody of minors to a parent "not up to appropriate paternal standards" regardless of the effects to the child,[3] obviously following "custom" that females are better suited to care for the young than males. Discrimination by sex. This theory has long been cast aside by the Maryland legislative body by statute Art. 72A/Art.46. Yet the judicial body ignores the statutes because of pervasive judicial bias. The father is

[3] The rights of the innocent child was denied by the Circuit Court by refusing to talk to Leigh, thus her right to be heard in court was denial of her constitutional right to have a say about her future.

fully qualified to care for minor teenagers but the Maryland Courts view father custody of younger minor children with an eye of suspicion.

Further, since clear error of the court was noted by the Court of Special Appeals on part of the Chancellor thereby denying equal protection of law by affirming a decree that on its own merits was consummated as a constitutionally impermissible court order by the lower court's finding of fact.

On appeal, petitioner presented the constitutional guarantees of Maryland Statutes. Regrettably, the Court of Appeals ignored State Statutes, State created rights, and the federal questions are now rightly and properly squarely brought to this high court for review and ultimate just decisions in the national interest of social development and human rights.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The Maryland Court of Appeals ignored the

sound principles announced by this court in Reed v. Reed, 404 U.S. 71 (1971), Frontiero v. Richardson, 411 U.S. 677 (1973), Stanton v. Stanton, 421 U.S. 7 (1975), and Weinberger v. Weisenfeld, 420 U.S. 636 (1975).

The sharp line drawn by the Court of Appeals by affirming the Circuit Court decision which is clearly in contrast to Maryland Legislative Statute, Art. 72A-Parent and Child, and Maryland Constitution, Art. 46, Equal Rights Amendment (ERA), plainly does not represent a fair, rational, and functional approach to the allocation of family benefits guaranteed by Maryland Statutes.

Therefore, the Maryland Court has broken the law as established by Maryland Legislative body, rendering government impotent. This cannot be tolerated by this high court.

As in Reed and Frontiero, the legislation passed by the legislative body was ignored; the

judicial decisional law impermissible distinguishes between men and women contrary to legislative acts. The decision of the Circuit Court affirmed by the Court of Appeals, reversing the Court of Special Appeals, straight-forwardly fails to meet the laws passed by the legislative body and the Congressional purpose of the ERA as established by Congress and accepted by State of Maryland when it added the ERA to its own Constitution.[1]

The pervasive bias of judicial authorities of denying your petitioner custody of his child as granted him by the Court of Special Appeals, when they found the lower court had erred, and the strong desire and motivation to have in his care his minor child is repugnant to constitutional guarantees. In light of Reed and Frontiero, "... it is now settled that the Equal Protection clause of the Fourteenth Amendment (like the Due Process clause of the Fifth) does not tolerate

discrimination on the basis of sex." See Cf Memorandum for the United States as Amicus Curiae at 8 Cleveland Board of Education v. LaFleur and Cohen v. Chesterfield County School Board, 414 U.S. 632 (1974).

In Reed, this court had before it an Idaho probate statute providing that "males must be preferred to females," in issuance of letters of administration. This court reversed by ruling that the distinction between men and women was an "invidious discrimination." With respect to the Equal Protection clause, this court said:

> ***In applying that clause, this court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways.
>
> ***The Equal Protection clause of that amendment does, however, deny to States the

> power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.
>
> ***[A]ll persons similarly circumstanced will be treated alike. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).
>
> ***By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection clause, 253 U.S. 412 (1920).

Subsequently, in Frontiero, this court held as unconstitutional a federal statutory provision under which a serviceman was allowed to claim his wife as a dependent without regard to whether she was in fact dependent upon him, while a servicewoman could not claim her husband as a dependent unless he was in fact dependent upon her for over one-half of his support.

Speaking for four members of the court, Mr. Justice Brennan said:

> ***Although the legislative history of these statutes sheds virtually no light on the purposes underlying the differential treatment accorded male and female members, a majority of the three judge District Court surmised that Congress might reasonably have concluded that, since the husband in our society is generally the "breadwinner" in the family and the wife typically the "dependent" partner, it would be more economical to require married female members claiming husbands to prove actual dependency to such members. 341 F.Supp., at 207.
>
> ***We can only conclude that classification based upon sex, like classification based upon race, alienage, or national origin, are inherently suspect, and must therefore

be subject to strict judicial scrutiny.

Four other members of this court concurred in the decision in Frontiero, three on the ground that under the decision in Reed the petitioner was not accorded due process of law, and one on the ground that the statutes worked an "invidious discrimination." Here the judicial law constitutes "invidious discrimination."

Subsequently, in Weinberger v. Weisenfeld, this court had before it a matter pertaining to the Social Security Act and Mr. Justice Brennan delivered the opinion saying:

> ***Since the Constitution forbids the gender-based differentiation premised upon assumptions as to dependency made in the statutes before us in Frontiero, the Constitution also forbids the gender based differentiation.
>
> ***[A]nd a father, no less than a mother has a constitutionally protected right to the

"Companionship, care, custody, and management" of "the children he has sired and raised..." Stanley v. Illinois, 405 U.S. 645, 651 (1972).

In Stanton v. Stanton, this court had before it a matter of child support as a result of decision laid down in a divorce decree. Mr. Justice Blackmun delivered the opinion, where this court held:

> ***We noted probable jurisdiction, 419 U.S. 893 (1974).
>
> ***This case presents the issue whether a State statute specifying for males a greater age of majority than it specifies for females denies, in the context of a parent's obligation for support payments for his children, the Equal Protection of the laws guaranteed by Sec. 1 of the Fourteenth Amendment.
>
> ***No regard was paid under the statute to the applicants' respective individual

qualifications.

> ***A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family and only the male for the market place and the world of ideas. See Taylor v. Louisiana, 419 U.S. 522 (1975). (emphasis supplied)

The Court of Appeals of Maryland not only refused to expose the questioned statute (Art. 72A Md. Code) to judicial scrutiny, it did not even pay lip service to the requirement of even-handed application of the Maryland law which must have a fair and substantial relation to the object of the legislation as pertains to Art. 46, Maryland Constitution and Art. 72A Code of Maryland, as amended.

The child placement benefit furnished to the promiscuous divorced female spouse of a broken marriage but not to the divorced fault-free male

spouse of a broken marriage, reflects the familiar stereotype that, throughout the nation's history, has operated to devalue men's efforts in the minor child custody sector. For the sole reason petitioner is a father, not a mother, he is denied benefits that would permit him to attend personally to the care of his minor daughter. The court felt it is alright for him to care for a teenage minor son and daughter but denied him the right to maintain family unity by awarding custody of the younger minor daughter. This is clearly obvious when the court issued its opinion in the Circuit Court which is being upheld by the Court of Appeals, yet categorically overruled by the Court of Special Appeals, State of Maryland.

Affirmance of Court of Appeals decision, concurring in the lower courts findings which is impermissible constitutionally, goes against Legislative Acts Art. 46/Art. 72A and this

judicial legislative law cannot withstand constitutional review and must be reversed to comply with Court of Special Appeals decision and Law of Maryland as Statute requires.

A child placement benefit which is designed to facilitate close parent-child association only to the female, when the child is of minor years, is not constitutionally allocated when it includes children being awarded to the factual promiscuous adulterous female but excludes children of minor years being awarded to the father of whom not a shred of evidence was offered against him of unfitness or unworthiness to have custody of the little girl. To ignore the Legislative Statutes (Art. 72A in effect since 1929) in favor of judicial presumption that the mother is better suited and ignoring that she committed a crime against the State and social law thereby elevating the promiscuous mother superior to the father, female better than male, is a position

which cannot be tolerated by this high court.

Equal justice under law may not be achieved by such invidious exclusion of persons guaranteed by the Constitution the Equal Protection of the laws. Through pervasive judicial bias, petitioner has been subjected to discrimination by sex by providing petitioner less protection of the law for the families of divorced male citizens and more for the families of divorced female citizens.

In short, case law applied, contrary to Statute Law, chastises petitioner who had not one iota of evidence against him as pertained to his fitness, emotional stability, and dedication to his children. This case definitively reflects the familiar stereotype that has long operated to deny fathers' efforts in the family unit benefits, child custody, care, and maintenance, equal to those accorded to mothers. Indeed the discriminatory pattern, custom, practice

encountered here is a prototype. Such prototype custom delineates this court's 8-1 judgment set down in Frontiero . Significantly, this court and virtually every branch and department of the Government has identified the pattern in question as one that discriminates invidiously:

> ***It shall be an unlawful employment practice...to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees...(citing Equal Employment Opportunity Comm. pursuant to Title VII, 29 C.F.R. Sec. 1604.1-1604.10)

The guidelines, set by EEO Commission explained in a family fringe benefit ruling, Title VII "is intended to protect individuals from the penalizing effects of...presumptions based on the collective characteristics of a sexual group." Fathers must have equal opportunity to care for

children of a broken marriage as is given to the female.

Similar recognition is noted in: 45 C.F.R. 86.46...(b) Benefits. ...a recipient which provides any...benefit to members of one sex pursuant to a State or local law or other requirements shall provide the same...benefit to members of the other sex.

It has been stated, "one person's preferential treatment can amount to another's detriment, and many males, contending they are victims of a reverse discrimination because of preferences for women, have gone to court to seek redress." In Defunis v. Odegaard, 416 U.S. 312 (1974) this court, three years ago, sidestepped a decision on reversed discrimination by declaring the legal issue moot. It is not moot herein. Unquestionably this high court eventually will have to decide where, if at all, to draw the line on preferential treatment. This appears to be that

case.

Throughout the case at bar, petitioner sedulously hit upon this very critical issue. Understandably so, for the irrationality of Maryland State authorities demonstrated INEQUALITY AND INJUSTICE by ignoring State statute and Constitutional law. Such acts denigrates the differential founders on constitutional shoals clearly marked in this court's precedents and collides head-on with Stanley, Frontiero, Skinner, Jimenez, Stanton, and Weinberger v. Weisenfeld.

This court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment, Jimenez v. Weinberger, Frontiero, Schlesinger v. Ballad, Weinberger v. Weisenfeld.

Therefore, if society's aim is to further a socially desirable purpose such as best interests of children, better care for growing children, it

should tailor, through this high court, any law directly to the end desired, not indirectly and unequally by helping females to retain custody of children when a long string of events at trial on merit shows clearly against female custody and not one iota against the father. Male custody of children can no longer be eyed with suspicion as in today's society the female's responsibilities are the same as the male. Reed, Weinberger v. Weisenfeld.

The State law of Maryland has long held that Rule 1086, Maryland Rules of Court Procedure, allowed the State's second highest court, to exercise its own judgment and petitioner relied on that rule. Now the State's highest court denied petitioner that law, which has not been set aside by this court. Such act, to not apply this law, is against all principles and demands reversal by this court as it does not coincide with the findings of the Special Court of Appeals

and even the Lower Circuit Court's findings. The Court of Appeals failed to give weight to decree as ruled by the Circuit Court is a constitutionally impermissible decree and order.

The Court of Special Appeals appears to have taken judicial note thereof. The Court of Appeals obviously did not; in fact, the Court of Appeals's decision was so obviously distorted as pointed out to them in petitioner's request for reconsideration (64a-76a). This is so obvious the Court of Appeals was anxious to establish new law, that it ignored the case history and therefore demands reversal by this court and remand to comply with the Court of Special Appeals' decision. Reasonable men can see that a clear showing of "abuse of discretion" existed on part of the Circuit Court. As other jurisdictions have long held, "custody determination is reversable on showing of abuse of discretion." Dinkel v. Dinkel 322 So. 2d 22, 24(Fla. 1975),

and the overwhelming weight of evidence in case at bar was against the female "custody finding is reversible when manifest weight of evidence is clearly contrary to best interests of child." Kauffman v. Kauffman 30 Ill. App. 3d 159, 333 N.E.2d 695, 697 (1975); See also, Pendergraft v. Pendergraft 23 N.C. App. 307, 208 S.E.2d 887, 889 (1974). Ironically, the Maryland State High Court relied on the aforementioned cases, yet failed to consider the "weight of evidence" and what was "clearly contrary" to best interest of child and the family unit required by law.

In sum, the State High Court abused their discretion in not recognizing the same fruitful criteria of the case as the Court of Special Appeals, which recognized the detrimental long-term effects on the child by continuing custody in an environment of continuous promiscuity and to a mother who showed no real concern for her children. The State's High Court had denied

petitioner his constitutional right of equal protection under law to be viewed as a first class citizen by factually denigrating the male to a second class citizen by elevating the promiscuous female to be superior to the male. State law has long held that brothers and sisters should grow and mature under the same roof. Hild v. Hild, 221 Md. 349 (1960). The Maryland High Court obviously does not now agree with human rights to have family unity and totally ignored the "family unit" by allowing this innocent little girl to be denied family unity of her brother and sister in her father's home. Thus clearly failing in applying their own law of which is a central issue in such cases "which parent" and "who will further the best interests of the child." Neuwiller v. Neuwiller, 257 Md. at 286, 262, A.2d at 737.

In sum, petitioner's constitutional rights have been violated by not granting unto him

"equal protection" of the law in the same degree as was given to the promiscuous female.

The State High Court turned to the present case and implied the Chancellor had the benefit of several sources of information. This is exactly petitioner's position. He did have information but abused his discretion by not applying that information in accordance with State law, Case law, and Art. 72A/Art. 46, Maryland Statutes. The Court Chancellor abused his discretion, was so found by the Court of Special Appeals, and affirmance of the Circuit Court's constitutionally impermissible decree by the State High Court further affirms constitutional guarantees have been abrogated, breaking the law, based on sex, and petitioner's Fourteenth Amendment guarantees, Weinberger.

The reasoning in Weinberger, supra., and Stanton, supra., thrusts this court, as well as State courts, another step toward condemning

different treatment of the sexes based on generalities rather than individual qualities, as State courts must acknowledge Law of the Land as laid down by this most highest of high courts.

Art. 46, Maryland Constitution, ERA, imposes a stricter standard in sex-discrimination cases than have the courts in Fourteenth Amendment cases generally. Now this court has the opportunity to rule accordingly.

Affirmance of the Court of Appeals' decision, which over-rides the Court of Special Appeals' decision, will firmly constitute different treatment of the sexes and deny petitioner and similar circumstanced divorced males, "Equal Protection" of the law.

The Court of Appeals', Maryland, decision to affirm the constitutionally impermissible decree of the lower court, Maryland, which had obvious gross error and abuse of discretion, shows inequalities and inconsistencies and reverts to

a criteria favoring female custody of children which can no longer be tolerated by this court in today's society. This court declared, in light of Reed and Frontiero:

> ***It is now settled that the Equal Protection clause of the Fourteenth Amendment (like the Due Process clause of the Fifth Amendment) does not tolerate discrimination on the basis of sex. 414 U.S. 632 (1974).

In addition, such acts go against the grain of this court's decision of Levy v. Louisiana (1968) 391 U.S. 68, 88 S.Ct. 1509 20 L.Ed. 2d 436 where it ruled:

> ***While a state has broad power when it comes to making classification..., it may not draw a line which constitutes an invidious discrimination against a particular class.
>
> ***The right asserted here involves the

> intimate familial relationship between a child and its own father.
>
> ***We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the father. (emphasis supplied)

Further, affirmance of the constitutionally impermissible Circuit Court decree by this court would clash head-on with decisions: Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) (all persons similarly circumstanced must be treated alike); Taylor v. Louisiana, 419 U.S. 522 (1975); Reed, Stanton, and Weinberger v. Weisenfeld.

The double edged discrimination involved in the instant case at bar, affirming lower courts decree(s) cannot withstand constitutional review and demands reversal and compliance with findings of the Court of Special Appeals is an absolute necessity of this court.

CONCLUSION

The instant case presents the court with an opportunity to provide the guidance essential to clear analysis by lower courts, federal and state, of gender-based differential commanded by law. This court should terminate speculation, confusion, and divergent interpretation of child custody, care, and maintenance as applied to the State Created Rights Article 46, ERA, Maryland Constitution and Art. 72A, Code of Maryland State Statutes. Similar actions were performed by this court in Weber and New Jersey Welfare Rights Organization, supra., this court should now clarify the dimensions of Weinberger v. Weisenfeld to lower courts involved in the child custody sector.

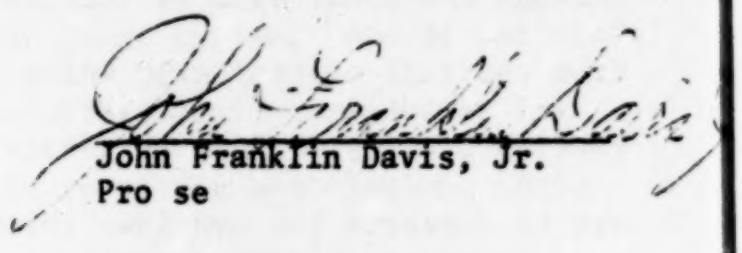
This case presents substantial federal questions relating to the interpretation and application of the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments.

Within the confines of these few pages representing proven professional decisions, and through the clear eyes of justice, it is apparent from the lack of reasoning which serves no State interest, clearly shows the State Court's failure to construe its own laws through constitutionally impermissible decrees and affirmance of same invalidates Maryland statutes and renders government of the people impotent, inasmuch as the court violates its own laws daily by relegating male parents to second class citizens.

Probable jurisdiction should be noted, and the case should and must be given plenary consideration, with briefs on the merits and oral argument (on granting of Writ of Certiorari, petitioner will designate to the court, an attorney at law to prepare Brief and present oral argument to the court on his behalf) for resolution of questions. In event this court

feels that "Writ of Error" is more appropriate, petitioner requests immediate Writ be issued.

Very respectfully submitted,



John Franklin Davis, Jr.
Pro se

1629 Gamewell Road
Ednor, Maryland 20904

(301) 421-9651

APPENDIX

IN THE COURT OF APPEALS OF MARYLAND

No. 150

September Term, 1976

MARY LOUISE DAVIS

v.

JOHN FRANKLIN DAVIS, JR.

Murphy, C.J.
Singley
Smith
Digges
Levine
Eldridge
Orth,

JJ

Opinion by Digges, J.

Filed: April 12, 1977

In this child custody dispute between divorced parents, we refuse to be cast in the role of a "super-super Solomon." The chancellor, properly assuming the duty of Solomon (as is his responsibility), awarded custody of the couple's youngest child, Leigh, to the mother, however, the Court of Special Appeals acted as a "super Solomon" by substituting its judgment for that of the trial court, and placed the girl with her father.[1] We now reverse that

1. We are referring, of course, to the story of King Solomon in the Bible. 1 Kings 3:16. The reluctance of appellate courts to play "super Solomon" was referred to in a recent decision of Pennsylvania's intermediate appellate court which (ironically we think) was reversed by that state's Supreme Court. Commonwealth ex rel. Myers v Myers, 237 Pa.Super.Ct. 192, 352 A.2d 458, 459 (1975), rev.d, Pa. , 360 A.2d 587 (1976).

judgment and direct reinstatement of the chancellor's order.

The case before us is not an atypical example of the custody fights that often accompany divorces. Petitioner Mary Louise Davis and respondent John Franklin Davis, Jr. were married in 1958; three children, and nearly fifteen and one-half years later, the parties separated. To be explicit, Mrs. Davis, together with her six-year-old daughter Leigh, left the homestead on January 31, 1974, and moved into an apartment. That September, Mr. Davis filed a bill of complaint seeking a divorce a vinculo matrimonii on the ground of his wife's adultery; additionally, he requested both temporary and permanent custody of the children. Mrs. Davis subsequently

filed a cross bill for divorce a mensa et thoro, for custody of the children, and for alimony and child support. Following proceedings before a domestic relations master, the Circuit Court for Montgomery County (Cahoon, J.) in March 1975 ordered pendente lite that custody of John and Mary (the two oldest children) be awarded to Mr. Davis, that custody of Leigh be awarded to Mrs. Davis, and that Mr. Davis pay $175 per month for the maintenance and support of the youngest child. The matter was heard before Judge Richard B. Latham on May 21 and 22, and by order of July 8, 1975, the court granted Mr. Davis a divorce a vinculo matrimonii; however, the chancellor reserved ruling on the permanent custody of the children. After the submission of a court investigator's report and recommendations, and following an additional hearing on December 11, 1975, Judge Latham ordered that Mrs. Davis be awarded custody of Leigh, that Mr. Davis be awarded custody of John and Mary, and that Mr. Davis pay monthly $175 to Mrs. Davis for the support and maintenance of Leigh.

Mr. Davis noted an appeal to the Court of Special Appeals; that court reversed the order of the chancellor and awarded custody of Leigh to her father.[2] Davis v. Davis, 33,MD.App. 295,364 A.2d 130 (1976). The court reasoned that it was "not bound by the clearly erroneous

2. Mrs. Davis did not cross-appeal the custody award of John and Mary to Mr. Davis and, therefore, the only question before the Court of Special Appeals was the custody of Leigh.

rule, Md. Rule 1086, but must exercise its own good judgment as to whether the conclusion of the chancellor is the best one," id. at 301 (133), that Mrs. Davis was required, but had failed, to show "that she had repented and there was little likelihood of a recurrence of (her adulterous) actions," id. at 302-03 (134), and therefore "that the chancellor was erroneous in his determination that the best interest of the child required that custody be continued in the mother." Id. at 303 (134). We granted certiorari. Because we disagree with both premises, as well as the conclusion, of the Court of Special Appeals, we shall reverse its judgment and reinstate the order of the chancellor.

(1) Standard of Appellate Review in Child Custody Cases

Because we recognize that there are prior decisions of this Court which support the Court of Special Appeals' statement in its opinion in this case that "an appellate court... must exercise its own good judgment as to whether the conclusion of the chancellor is the best one, "33 Md.App. at 301, 364 A.2d at 133, and inasmuch as, in line with our more recent cases, we now categorically reject this view, we feel constrained to clarify the standards of appellate review in child custody cases.

Maryland Rule 886 (applicable to this Court) and, in identical language, Rule 1086 (applicable to the Court of Special Appeals) provide the standard of review of actions tried

without a jury.[3] In such actions, the appellate courts of this State "review the case upon both the law and the evidence, but the judgment of the lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses." Rules 886 & 1086. The "clearly erroneous" concept is no newcomer to Maryland procedure: The predecessor of Rule 886 (adopted effective January 1, 1957 as Rule 886 a), General Rules of Practice and Procedure, Part Three III, Rule 9 c

3. Since Rules 886 and 1086 are identical, what we say with respect to one is equally applicable to the other.

(effective September 1, 1944), contained the same scope of review embodied in the present rule; moreover, prior to the standard's codification as a rule, it was the time-honored practice on appeals to this Court in equity actions to give great weight to the chancellor's findings of fact. See,e.g., Garner v Garner, 171 Md. 603, 614-15, 190 A. 243, 249 (1937); Sporrer v. Ady, 150 Md. 60, 70, 132 A. 376, 380 (1926). And we have heretofore noted that these rules in essence merely conformed the scope of review in nonjury actions at law to the scope of review we had always applied in equity appeals. See Greenberg v. Dunn, 245 Md. 651, 655, 227 A.2d 242, 244 (1967); Wallace v Fowler, 183 Md. 97, 99, 36 A.2d 691, 692 (1944). Nothing in Rule 886 indicates that it

does not apply to all cases tried without a jury, and we have explicitly held that the rule applies when we review nonjury criminal causes (under Rule 772), State v Devers and Webster, 260 Md. 360, 381, 272 A.2d 794, 805, cert. denied, 404, U.S. 824 (1971); Greene v State, 229 Md. 432, 433, 184 A.2d 621, 622 (1962) (per curiam), nonjury defective delinquency cases, Johns v Director, 239 Md. 411, 412, 211 A.2d 751, 752 (1965), child support awards, Wooddy v. Wooddy, 258 Md. 224, 228, 265 A.2d 467, 470 (1970), and child custody cases. Hild v Hild, 221 Md. 349, 359, 157 A.2d 442, 448 (1960). Since Hild we have consistently applied the "clearly erroneous" portion of Rule 886 (or that standard without citation to the rule) in our review of child custody

awards. See, e.g., Hall V. Triche, 258 Md. 385, 386, 266 A.2d 10 (1970) (per curiam); Spencer v. Spencer, 258 Md. 281, 284, 265 A.2d 755, 756 (1970) (per curiam); Goldschmiedt v. Goldschmiedt, 258 Md. 22, 26, 265 A.2d 264, 266, (1970); Franklin v. Franklin, 257 Md. 678, 684, 264 A.2d 829, 832 (1970); Kauten v Kauten, 257 Md. 10, 12, 261 A.2d 759, 761 (1970); Hardisty v. Salerno, 255 Md. 436, 438, 258 A.2d 209, 210 (1969) (per curiam); Holcomb v. Holcomb, 255 Md. 86, 87-88, 256 A.2d 886, 887 (1969) (per curiam); Orndoff v. Orndoff, 252 Md. 519, 522, 250 A.2d 627, 628 (1969); Cornwell v Cornwell, 244, Md. 674, 678, 224 A.2d 870, 872-73 (1966); Andrews v Andrews, 242 Md. 143, 154, 218 A.2d 194, 201 (1966); Daubert v Daubert, 239, Md. 303, 309, 211 A.2d

323,327 (1965); Winter v. Crowley, 231 Md. 323, 329, 190 A.2d 87, 90 (1963); Parver v. Parker, 222 Md. 69, 75-76, 158 A.2d 607, 610 (1960). Moreover, even prior to our explicit recognition in Hild of the applicability of Rule 886, our predecessors in essence utilized the clearly erroneous standard when reviewing factual determinations on appeals of child custody actions. See, e.g., Sewell v. Sewell, 218 Md. 63, 71, 145 A.2d 422, 426 (1958); Wilhelm v. Wilhelm, 214 Md. 80, 84, 133, A.2d 423, 425 (1957); Trudeau v. Trudeau, 204 Md. 214, 218, 103 A.2d 563, 564 (1954); Cullotta v. Cullotta, 193 Md. 374, 384, 66 A.2d 919, 924 (1949); Sibley v. Sibley, 187 Md. 358, 362, 50 A.2d 128, 130 (1946).

Having determined that Rule 886 is controlling in child custody cases, we now consider the extent to which the "clearly erroneous" portion of it applies in such appeals. The words of the rule itself make plain that an appellate court cannot set aside factual findings unless they are clearly erroneous, and this is so even when the chancellor has not seen or heard the witnesses. Sewell v Sewell, 218 Md. 63, 71, 145 A.2d 422, 426 (1958); see, e.g., Dorf v. Skolnik, Md. , , A.2d , (1977) (No. 153, September Term, 1976, opinion filed April 11, 1977); Chalkley v. Chalkley, 236 Md. 329, 333, 203 A.2d 877, 880 (1964). On the other hand, it is equally obvious that the "clearly erroneous" portion of Rule 886 does not

apply to a trial court's determinations of legal questions or conclusions of law based upon findings of fact. See. e.g., Clemson v. Butler Aviation, 266 Md. 666, 671, 296 A.2d 419, 422 (1972); A. S. Abell v. Skeen, 265 Md. 53, 55, 288 A.2d 596, 597 (1972).

Although these two propositions are clear, there is some confusion in our cases with respect to the standard of review applicable to the chancellor's ultimate conclusion as to which party should be awarded custody. Notwithstanding some language in our opinions that this conclusion cannot be set aside unless clearly erroneous. See, e. g., Spencer v. Spencer. 258 Md. 281, 284, 265 A.2d 755, 756 (1970) (per curiam); Goldschmiedt v. Goldschmiedt, 258 Md. 22, 26, 265 A.2d 264, 266 (1970),

we believe that, because such a conclusion technically is not a matter of fact, the clearly erroneous standard has no applicability. However, we also repudiate the suggestion contained in some of our predecessors' opinions, see, e.g., Melton v. Connolly, 219 Md. 184, 188, 148 A.2d 387, 389 (1959); Butler v. Berry, 210 Md. 332, 339-40, 123 A.2d 453, 456 (1956); Burns v Bines, 189 Md. 157, 164, 55 A.2d 487, 490 (1947); cf. Ex Parte Frantum, 214 Md. 100, 105, 133 A.2d 408, 411, cert. denied, 355 U. S. 882 (1957) (adoption case), and relied upon by the Court of Special Appeals in Sullivan v. Auslaender, 12 Md. App.1, 3-5, 276 A.2d 698, 700-01 (1971), and its progeny, see, e.g., Sartoph v. Sartoph, 31 Md.App. 58, 64 & n.1, 354 A.2d 467, 471 (1976); Vernon v. Vernon,

30, Md.App, 564, 566, 354 A.2d 222, 224 (1976), that appellate courts must exercise their "own sound judgment" in determining whether the conclusion of the chancellor was the best one. Quite to the contrary, it is within the sound discretion of the chancellor to award custody according to the exigencies of each case, Miller v. Miller, 191 Md. 396, 407, 62 A.2d 293, 298 (1948), and as our decisions indicate, a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. See, e.g., Pontorno v. Pontorno, 257 Md 576, 581, 263 A.2d 820, 822 (1970); Neuwiller v Neuwiller, 257 Md. 285, 287, 262 A.2d 736, 737 (1970); Kauten v. Kauten, supra. 257 Md. at 13, 261 A.2d at 761; Wood v. Wood, 227 Md. 112, 115, 175 A.2d 573, 575 (1961);

Oliver v. Oliver, 217 Md. 222, 230, 140 A.2d 908. 912 (1958); ef. Dorsett v. Dorsett, 281 A.2d 290, 292 (D.C. 1971) (great deference accorded trial judge in child custody cases; no abuse of discretion found); Dinkel v. Dinkel, 322 So.2d 22, 24 (Fla. 1975) (custody determination not reversible except on showing of abuse of discretion); Kauffman v. Kauffman, 30 I11.App.3d 159, 333 N.E.2d 695, 697 (1975) (custody finding not reversible unless against manifest weight of evidence or "clearly contrary" to best interests of child); Feldman v. Feldman, 55 Mich.App. 147, 222 N.W.2d 2, 3 (1974) (child custody determination not disturbed unless factual findings against great weight of evidence or unless there is abuse of discretion or clear legal error); Pendergraft v.

Pendergraft, 23 N.C.App. 307, 208 S.E. 2d 887, 889 (1974) (custody award not reversed except on showing of abuse of discretion). See generally 2W. Nelson, Divorce and Annulment 15.50 (2d ed. 1961 rev.). Such broad discretion is vested in the chancellor because only he sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor.

In sum we point out three distinct aspects of review in child custody disputes. When the appellate court scrutinizes factual findings, the

clearly erroneous standard of Rules 886 and 1086 applies.[4] If it appears that the chancellor erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless, Finally, when the appellate court views the ultimate conclusion of the chancellor founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the chancellor's decision should be disturbed only if there has been a clear abuse of discretion.

4. We note that when it appears on review that the chancellor failed to take sufficient evidence into account, we may remand the case without affirmance or reversal for a redetermination, after further proceedings, as to what is in the best interests of the children. See e.g., Quellette v. Wuellette, 246 Md. 604, 608-09, 229 A.2d 129, 131 (1967); Jester v. Jester, 246 Md. 162, 171, 228 A.2d 829, 834 (1967); Md. Rule 871 a.

(2) Finding of Parent's Adultery As Affecting Award of Custody

The Court of Special Appeals in this case, after taking notice of the chancellor's findings of Mrs. Davis' adulterous conduct, concluded that because a presumption of unfitness had arisen, "(a) showing that she had repented and there was little likelihood of a recurrence of these actions was mandatory." 33 Md.App. at 302-03, 364 A.2d at 134. Premised on the ground that this requirement violated her rights to be free from compulsery self-incrimination, U.S.Const., Amend. V; Md. Decl. of Rts., Art. 22, Mrs. Davis argues that the Court of Special Appeals erred in applying it. Although we agree with the petitioner that the Court of Special Appeals applied the wrong standard, we reach that conclusion by a

different route, and find it unnecessary to pass on constitutional issues.

The Maryland Reports are filled with decisions which discuss the effect a parent's adulterous conduct has on the award of custody. Although our prior decisions recognized that one who has engaged in adultery is not ipso facto unfit to have custody, see, e.g., Orndoff v. Orndoff, 252 Md. 519, 522, 250 A.2d 627, 628 (1969); Cornwell v. Cornwell, 244 Md. 674, 679, 224 A.2d 870, 873 (1966), our predecessors held that a "strong presumption" of unfitness arises which only a "strong showing" of facts evidencing fitness will overcome. See, e.g., Shanbarker v. Dalton, 251 Md. 252, 257, 247 A.2d 278, 281 (1968); Bray v. Bray, 225 Md. 476, 482-83, 171 A.2d 500, 504

(1961). Such decisions point out that this rule was not formulated to punish the guilty parent, but rather was based on the presumption that adultery is a "highly persuasive indicium" that the offending person is not the better of the two to raise the child. See, e.g., Palmer v. Palmer, 238 Md. 327, 331, 207 A.2d 481, 483 (1965); Wallis v. Wallis, 235 Md. 33, 36-37, 200 A.2d 164, 165-66 (1964).

Perhaps in response to the rapid social and moral changes in our society, two of this Court's most recent cases have implicitly recognized that a finding of adultery per se no longer is a "highly persuasive indicium" of unfitness to have custody of one's child. In Pontorno v Pontorno, supra, 257 Md. at 580, 263 A.2d at 822, Judge Finan for

the Court, without mention of any presumption of unfitness, stated that "a finding of adultery is relevant to the extent that it may affect the welfare of the children." And in Neuwiller v. Neuwiller, supra, 257 Md. at 286, 262 A.2d at 737, this Court, again speaking through Judge Finan, held that where adulterous behavior is "not determinative of the central issue (as to) who will further the best interests of the child," an infant may be awarded to a mother despite the fact that there is no showing that she had discontinued her conduct. Cf, Hild v. Hild, 221 Md. 349, 363-64, 157 A.2d 442, 450 (1960) (Hammond, J., dissenting) (adultery should not create presumption of unfitness, but should be weighed by trier of fact in relation to individuals in each

case). We now explicitly hold what the Pontorno and Neuwiller cases implicitly recognized, i.e., that whereas the fact of adultery may be a relevant consideration in child custody awards, no presumption of unfitness on the part of the adulterous parent arises from it; rather it should be weighed, along with all other pertinent factors, only insofar as it affects the child's welfare. We note that this view is in accord with the decisions of the majority of other courts around the country. See, e.g., Dinkel v. Dinkel, supra, 332 So.2d at 24; Lockard v. Lockard, 193 Neb. 400, 227 N.W.2d 581, 583 (1975); Commonwealth of Pa. ex rel Myers v. Myers, Pa. , 360 A.2d 587, 590 (1976). See generally Annot., 23 A.L.R.3d 6, 38-42 (1969).

(3) The Present Case

We now return to a consideration of the custody award by Judge Latham in this case. The chancellor had the benefit of several sources of information, gathered over a prolonged period of time, to aid his determination of what custodial arrangement would be in the best interests of Leigh. On January 10, 1975, a hearing was held before a domestic relations master in connection with the pendente lite custody of the three minor children. Six witnesses testified at that hearing: Mr. Davis and a private investigator hired by him, as well as Mrs. Davis, two of Leigh's teachers and one of the petitioner's neighbors. Rejecting Mr. Davis' contention that his wife was unfit to be custodian of Leigh, the mas-

ter made the following findings and recommendation in the report.

> This Master has carefully considered the testimony adduced. While it may be that Mrs. Davis has, on occasion, shown what might be characterized as poor judgment in her association with other men, she has, in the opinion of this Master, (at least on the record of the hearing) sequestered the minor daughter from her association with her two (2) male friends. The Master does not feel that such association as has been shown clearly by the testimony to exist, is such as would warrant, at least on a pendente lite basis, the removal of the child from the custody of the mother, Katherine Leigh is adequately housed and clothed and attends a school not too far from her home. She appears to be doing well in school and has a competent sitter located in the same building in which the child lives, with a playmate her own age with whom to associate, who is the child of the same sitter.

At the May 21 and 22, 1975 divorce and custody proceedings before Judge Latham, Mr. Davis, together with three private investigators, sought to establish the

adulterous conduct of his wife and her unfitness to be awarded permanent custody of Leigh. Mrs. Davis, along with several neighbors and babysitters of Leigh as well as her two teachers, sought to convince the court that the mother's continued custody would be in Leigh's best interests.

Before Judge Latham ultimately made his decision as to the custody of the children (the divorce having been decreed in July), he had the benefit of a further hearing as well as the report of the court investigator. At a December 11, 1975 hearing, Mr. Davis again testified on his own behalf, and called two witnesses who were neighbors and potential babysitters for Leigh; he also interrogated his former wife. The court-ordered report contained additional in-

formation hearing on the fitness of both parties to have permanent custody of Leigh.[5] The investigator, after having interviewed both parents and all three children, found no evidence of sexual misconduct by Mrs. Davis beyond February 1975, and recommended that the present

5. Although the investigator's report was never received into evidence, it is clear from the record that both parties studied it and that the court thought it unnecessary to formally admit it into evidence at the December 11, 1975 hearing. Judge Latham remarked at that time:

> It can be introduced and made a part of the evidence, if anybody wants to do it that way. On the other hand, it's not necessary. I have fully read the report on several occasions, as I previously indicated, and whether I agree with everything it says or not remains to be seen.

No one contends that the report is not part of the record on appeal, and we treat it as though it had been formally admitted into evidence at trial. State Hwy. Adm. v. Transamerica Inc., 278 Md. 690, 701, 367, A.2d 509, 516 (1976).

arrangement (John and Mary with Mr. Davis and Leigh with Mrs. Davis) be continued since "(a)ny adjustment by the children that was necessary has been made, and now they seem to have come to terms with the family situation."

Because we must determine whether the chancellor's findings of fact were clearly erroneous, whether he made any errors of law, or whether he abused his discretion in awarding custody of Leigh to her mother, we here quote his oral opinion in full;

> Gentlemen, I have, of course, heard all of the testimony in connection with the original trial of this case, which consumed a couple of days, and I have had the benefit of reviewing that transcript, and I have had the benefit of our custodial investigation in connection with the three children.
>
> It's obvious to me that Mr. Davis can and has provided an ade-

quate or even more than adequate home for the two older children, and certainly on the basis of their latest report cards, and the custodial investigation report they are doing well with him.

It's equally obvious to me that Mrs. Davis is able to and has been providing an adequate home for the youngest daughter, Leigh. It's quite obvious to me that she would be unable to remain where she is if the Court awarded her custody of all three of the children, but I don't intend to do that, so it's not necessary to really even discuss that aspect of the case.

The primary concern of the Court in this particular case has been the younger child, Leigh, who has been with her mother, and as to whether that should be at least a temporary, permanent arrangement, or whether the custody should be changed to the father.

Being aware of the law in reference to the adultery of the mother and the presumptions that arise from it, at the same time we must consider that the law in the State of Maryland is, and has been for some time, that the best interests of the child is the paramount consideration that the Court should consider.

The present situation, obviously whenever a father and mother are divorced, and children are separated, is not very desirable. At the same time, for a substantial period of time, well in excess of a year, the present arrangement has been in effect, and has apparanently been working. That is not to say that if Mr. Davis had had Leigh during that period of time that she might not have made the same progress in school, and in her upbringing as she has with her mother. At the same time, the Court, based on all the information in this case, is reluctant at this point to make any change in the custody of Leigh, because I think that that would not be in her best interests.

Now, I am mindful though of the fact that, and as you had indicated, Mr. Foley (respondent's attorney) , this is something that the Court has the right to review, and I would certainly expect to review it very carefully if at any time any information was brought to the Court's attention that she was, Mrs. Davis was conducting herself in any way that made it inadvisable to keep the custody of Leigh with her.

Initially, we note that none of the chancellor's findings of fact is clearly

erroneous--in reality, there appear to be no factual matters that ever were seriously in dispute. We also conclude that the chancellor recognized that the law requires custody to be awarded so as to further the best interests and welfare of the child. It is obvious that in effectuating this legal mandate, Judge Latham took into account the crucial factors present here, among them: that Leigh had been living with her mother alone for the past two years and was adjusted to this arrangement; that she was doing well in school and was adequately provided for at home; that even though Mrs. Davis had engaged in adulterous conduct in the past, there was not showing that it had ever deleteriously affected Leigh; and that there was uncontroverted evidence that Mrs.

Davis had engaged in no sexual misconduct since February 1975. We discern no abuse of discretion. A case such as this, where custody might well have been awarded to either parent, aptly demonstrates the advisability of leaving to the chancellor the delicate weighing process necessary in child custody cases; to disturb the award here would require that we substitute our judgment for that of the chancellor, and an appellate court sits in a much less advantageous position to assure that the child's welfare is best promoted.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS THAT IT AFFIRM THE ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY. COSTS TO BE PAID BY RESPONDENT

Mary Louise Davis * Court of Appeals

* of Maryland

v.

* No. 150

John Franklin Davis, Jr.* September Term, 1976

MANDATE

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS the case of John Franklin Davis, Jr. v Mary Louise Davis came before you and wherein the judgment of the said Court of Special Appeals of Maryland was duly entered on the eighth day of October, 1976 as appears from the transcript of the record of the said Court of Special Appeals of Maryland which was brought into the Court of Appeals of Maryland by virtue of a writ of certiorari dated December 30, 1976; and

WHEREAS in the September Term, 1976 the said cause came on to be heard before the Court of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordered and adjudged on April 12, 1977 by this Court that the judgment of the Court of Special Appeals be reversed; case remanded to your Court with directions that it affirm the order of the Circuit Court for Montgomery County; costs to be paid by respondent.

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause in conformity with the judgment of this Court above stated as accord with right and justice, and the Constitutuion and laws of Maryland, the said writ notwithstanding.

WITNESS the Honorable Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland this 31st day of May, 1977.

//S//
James H. Norris, Jr.
Clerk
Court of Appears of Maryland

COURT OF APPEALS
OF MARYLAND

Court of Appeals Building
Annapolis, Md. 21401

May 31, 1977

John R. Foley, Esq.
Attorney at Law
15th & New York Ave., N.W., Suite 630
Washington, D.C. 20005

Re: Mary Louise Davis v.John Franklin Davis Jr.
No. 150 - September Term, 1976

Dear Mr. Foley:

The Court has considered the appellee's motion for reconsideration of decision filed on May 11 in the above entitled case and has denied said motion this date. A copy of the mandate is enclosed.

The record is being returned to the Court of Special Appeals.

Very truly yours,

//S//
James H. Norris, Jr.
Clerk

JHNjr/h
encl.
cc: A.J.D. Schmidt, Esq.

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 110

September Term, 1976

JOHN FRANKLIN DAVIS, JR.

v.

MARY LOUISE DAVIS

Thompson
Powers
Melvin,
JJ.

Opinion by Thompson, J.

Filed: October 8, 1976

This case involves the custody of Katherine Leigh Davis, (Leigh), born March 21, 1968, the youngest child of John Franklin Davis, Jr., the appellant, and Mary Louise Davis, the appellee. On September 25, 1974, Mr. Davis filed a suit in the Circuit Court for Montgomery County for a divorce a vinculo matrimonii on the grounds of adultery and asked for custody of the three minor children of the parties. In her answer and in a cross-bill the appellee sought custody of the three children. The chancellor awarded Mr. Davis a divorce as requested, gave him custody of the two older children of the parties and dismissed the appellee's cross-bill. Mrs. Davis was given custody of Leigh. Mr. Davis has appealed; Mrs. Davis did not; thus, the only question before the

Court is the custody of Leigh.[1]

The parties were married on September 26, 1958, and lived in Montgomery County, Maryland, until the date of trial, December 11, 1975. Three children were born to the parties; John Franklin Davis, III, now age 17, Mary Jane Davis, now age 15, and Leigh, now age 8. While their marriage appears to have been anything but harmonious, at least during the last year, the parties lived together until they separated on January 31, 1974. During this period Mr. Davis complained to his wife as to the amount of her drinking and her occasionally returning home in the early hours of the morning. On January 31, 1974, the appellee, Mary Louise Davis, left

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1. In view of our decision we will not need to treat a second question raised by Mr. Davis.

the family home and took an apartment. Her youngest daughter accompanied her but apparently the two older children declined to do so. There was evidence that after the sepraation and prior to the trial Mrs. Davis held a number of different jobs but always, was careful to arrange that her daughter was properly cared for by neighbors or other baby sitters, including in some instances her older children. The older children visited her with some frequency and the youngest daughter spent Friday nights and Saturdays with Mr. Davis. The relationship of each parent with all the children was described as good. Mr. Davis has made arrangements for a neighbor and his older children to take care of Leigh from the time she returns from school until he re-

turns from work, in the event he should be awarded custody. Mr. Davis lives in a nice four-bedroom dwelling. Mrs. Davis lives in a nice two-bedroom apartment.

There was strong evidence that Mrs. Davis had committed adultery with three different men on many occasions from June of 1974 until November 30, 1974, more than two months after the bill of complaint had been filed in these proceedings. Specifically the following situations were observed:

1) Prior to June, 1974, Mrs. Davis was observed in the company of William Katzenberger numerous times including several at the New Yorker Restaurant in Laurel;

2) On June 26, 1974, Mrs. Davis was observed entering Katzenberger's apartment building at 4:45 P. M. from which they exited at 6:08 p. m.

3) On June 27, 1974, Mrs. Davis was observed "hugging and kissing" Ray Giovannoni in the latter's automobile parked outside of the Side Door Restaurant in Gaithersburg;

4) On July 2, 1974, at approximately 6:00 p. m. Mrs. Davis was observed kissing Katzenberger in a service station;

5) On July 3, 1974, Mrs. Davis was observed entering her apartment at approximately 12:46 p. m. from which she exited at 1:31 p. m. followed by Katzenberger at 1:36 p.m.;

6) On July 18, 1974, Mrs. Davis and Giovannoni were observed leaving the Side Door Restaurant shortly after midnight, entering the latter's automobile, driving to a dark area in the rear of the parking lot where they parked for 10 minutes before returning to the bar;

7) On July 24, 1974, Mrs. Davis and Giovannoni were observed entering Giovannoni's apartment building at 11:50 p.m., the light went off at 1:05 a.m., and Mrs. Davis left the building at 6:45 a.m.;

8) On September 1, 1974; Mrs. Davis and Giovannoni were observed in the latter's apartment at midnight preparing for a party which was still going on at 3:30 a.m.;

9) On September 4, 1974, Mrs. Davis was observed leaving the Washington Country Club at 8:25 p. m., arm in arm with Dale Thompson, embracing and kissing passionately after which they went to Thompson's home in Colesville where they stayed until 12:35 a.m.;

10) On September 9, 1974, Mrs. Davis arrived at Thompson's home at midnight, Thompson arrived at 1:30 a. m., at 2:30 a. m. the lights on the first floor went on, at 3:00 a.m. all lights went out until Mrs. Davis left the home at 4:30 a. m.;

11) On October 26, 1974, Mrs. Davis and Giovannoni arrived at the latter's apartment at 2:00 a.m. and at 9:30 a.m. Mrs. Davis left;

12) On November 30, 1974, Mrs.Davis and Giovannoni arrived at his apartment at 2:30 a.m. and at 9:30 a.m. Mrs. Davis left.

While there is no evidence that the appellee committed adultery at a location where Leigh was present, there was evidence that on occasions Mrs. Davis has taken her daughter out in the company of at least two of these men. Mrs. Davis did not in the testimony, either at the custody hearing nor at the earlier trial, discuss her adulterous relationships in any manner. The chancellor with reference to the adulteries made no detailed findings of fact but stated that the "evidence certainly was overwhelming in connection with her adultery." The court found that Mr. Davis provided a more than adequate home for the two older children and that they seemed to be doing well with him. He found that Mrs. Davis had been providing an adequate home for the youngest child, Leigh.

Stating that he was aware of the presumptions of unfitness that arise from adulteries, the chancellor felt that the best interest of the child was continuing the present situation rather than changing custody. The chancellor did not spell specific visitation rights but gave each party to the proceedings the reasonable rights of visitation with the children because the parties had themselves worked out these rights in a satisfactory manner.

Inasmuch as the chancellor's opinion after the custody trial was very brief, we will quote it in full:

> "Gentlemen, I have, of course, heard all of the testimony in connection with the original trial of this case, which consumed a couple of days, and I have had the benefit of reviewing that transcript, and I have had the benefit of our custodial investigation in connection with the three children.

> "It's obvious to me that Mr. Davis can and has provided an adequate or even more than adequate home for the two older children, and certainly on the basis of their latest report cards, and the custodial investigation report they are doing well with him.
>
> "It's equally obvious to me that Mrs. Davis is able to and has been providing an adequate home for the youngest daughter, Leigh. It's quite obvious to me that she would be unable to remain where she is if the Court awarded her custody of all three of the children, but I don't intend to do that, so it's not necessary to really even discuss that aspect of the case.
>
> "The primary concern of the Court in this particular case has been the younger child, Leigh, who has been with her mother, and as to whether that should be at least a temporary, permanent arrangement, or whether the custody should be changed to the father.
>
> "Being aware of the law in reference to the adultery of the mother and the presumptions that arise from it, at the same time we must consider that the law in the State of Maryland is and has been for some time, that the best interests of the child is the paramount consideration that the Court should consider.

"The present situation, obviously whenever a father and mother are divorced, and children are separated, is not very desirable. At the same time, for a substantial period of time, well in excess of a year, the present arrangement has been in effect, and has apparently been working. That is not to say that if Mr. Davis had had Leigh during that period of time that she might not have made the same progress in school, and in her upbringing as she has with her mother. At the same time, the Court, based on all the information in this case, is reluctant at this point to make any change in the custody of Leigh, because I think that that would not be in her best interests.

"Now, I am mindful though of the fact that, and as you had indicated, Mr. Foley, this is something that the Court has the right to review, and I would certainly expect to review it very carefully if at any time any information was brought to the Court's attention that she was, Mrs. Davis was conducting herself in any way that made it inadvisable to keep the custody of Leigh with her."

It hardly requires citation of authority to state the cardinal rule in custody cases is the welfare of the child. The rule is mentioned in every

such case. In Sullivan v. Auslaender, 12 Md. App. 1, 3-5, 276 A.2d 698 (1971). this Court carefully reviewed the decisions of the Court of Appeals and determined that in making this determination an appellate court is not bound by the clearly erroneous rule, Md. Rule 1086, but must exervise its own good judgment as to whether the conclusion of the chancellor is the best one. In making this determination we, of course, accept the chancellor's factual findings but not necessarily his conclusions. Sartoph v. Sartoph, 31, Md. App. 58, 64, 354 A.2d 467 (1976). To guide us in making determinations a number of rules have been developed, one of which is that the custody of a child should not be disturbed unless there is strong reason

affecting the welfare of the child. Krebs v. Krebs, 255 Md. 264, 257 A.2d 428 (1969), Vernon v Vernon, 30 Md. App. 564, 354 A.2d 222 (1976). Split custody is frowned upon. Bryce v. Bryce, 229 Md. 16, 181 A.2d 455 (1962). Another rule is that an adulterous parent is presumed to be unfit, Palmer v. Palmer, 238 Md. 327, 331, 207 A.2d 481, 483 (1965); Hild v. Hild, 221 Md. 349, 358, 157 A.2d 442, 447 (1960); Pangle v Pangle, 134 Md. 166, 170, 106A. 337, 338 (1919); Widdoes v. Widdoes, 12 Md. App. 225, 235, 278 A.2d 100, 105 (1971). This presumption of unfitness can be overcome by showing that the adulterous party has repented, has terminated the relationship and has changed his or her ways so that there is little likelihood of a reoccurrence of the past

conduct. See for examples: Neuwiller v. Neuwiller, 257 Md. 285, 262 A.2d 736 (1970); Kauten v Kauten, 257 Md. 10, 261 A.2d 759 (1970); Sartoph v. Sartoph, supra; Powers v. Hadden, 30 Md. app. 577, 353 A.2d 641 (1976). It is the rare case in Maryland that has awarded custody to an adulterous parent, absent a showing that the wayward conduct had terminated. In each case there are most unusual circumstances.[2] In the in-

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2. In Pratt v. Pratt, 245 Md. 716, 228 A.2d 611 (1967), the Court did not expressly find that the adulteress had repented her ways but the evidence revealed that a thirteen year old daughter had expressed an intense dislike for her father and indicated that she would refuse to live with him under any circumstances. Custody of a two year old son was also granted to the wife because (1) he had always been properly cared for by her, (2) of the policy against dividing custody, and (3) the husband failed to substantiate that he and his relatives could provide a good home. In Orndoff v Orndoff, 252 Md.

stant case the appellee argues that inasmuch as the last adultery shown by the record occurred in November of 1974 and the hearing as to custody did not occur until December 11, 1975, this alone showed that the relationships have been terminated. We do not view the evidence in that manner. The appellant was granted his divorce on July 7, 1975, and the questions of custody was reserved until after the hearing on December 11, 1975,

---

2. Continued

519, 250 A.2d 627 (1969), it was found that the evidence of the adultery was unpersuasive but the Court of Appeals went on to say that even if the illicit conduct had been established the lower court would not have been in error in finding for the wife. The lower court had found, however, that the appellant's petition has been motivated by a desire to punish the mother for her transgressions rather than out of love for the child. In Mullinix v. Mullinix, 12 Md. App. 402, 278 A.2d 674 (1971), the Court found that the chancellor's decree prohibiting contact between the adulteress and her paramour insured that she would change her ways.

the final order having been signed on January 5, 1976. It seems apparent to us that the appellant after having overwhelmingly demonstrated the wife's wayward manner could rely on the fact that it would be up to her to show a change in the course of her conduct; indeed, the cases place such a burden on the adulterous parent. See Widdoes v. Widdoes, supra at 237, 238. We note that in her testimony the appellee failed to discuss in any manner her adulteries or any change in her way of life. In a situation as we have here where the past indiscretions of the appellee are flagrant it became necessary for her to demonstrate that the opportunity and privilege of raising Leigh were more important than this type of conduct. A showing that she had re-

pented and there was little likelihood of a recurrence of these actions was mandatory. We, therefore, find that the chancellor was erroneous in his determination that the best interest of the child required that custody be continued in the mother. As has often been pointed out, award of custody of a child is not to punish the errant parent but simply to look after the best interest of the child. In applying the rule that the custody of a child should not be disturbed, the chancellor avoided disturbing the relationship between the child and mother which had been long continued; however, he failed to consider the long term affect of having a child taught her sexual morals by an unrepentant, flagrantly adulterous and promiscuous parent. We think the long

term efiect of the latter is more important to the child than the temporary trauma which will be caused by her separation from her mother. We leave it to the parties to work out their own visitation rights which, of course, the chancellor can assure if such an agreement is not possible.

ORDER AWARDING CUSTODY OF KATHERINE LEIGH DAVIS TO APPELLEE REVERSED AND CUSTODY AWARDED TO APPELLANT. APPELLANT TO PAY THE COSTS.

JOHN FRANKLIN DAVIS, JR. * IN THE COURT OF

Appellant * SPECIAL APPEALS

v.

MARY LOUISE DAVIS * OF MARYLAND

Appellee * No. 110, September Term, 1976

(No.150,September Term, 1976 In the Court of Appeals of Maryland)

ORDER

Pursuant to the Mandate of the Court of Appeals of Maryland entered on the 31st day of May, 1977;

It is this 2nd day of June, 1977, ORDERED, by the Court of Special Appeals of Maryland, that the Mandate of this Court issued 8 November 1976 reversing the judgment theretofore obtained in the Circuit Court for Montgomery County be, and is hereby, vacated;

And, it is further ORDERED, that the judgment of the Circuit Court for Montgomery County be, and is hereby affirmed; costs to be paid by appellant.

//S//
Richard P. Gilbert
CHIEF JUDGE

THE COURT OF SPECIAL APPEALS OF MARYLAND
ANNAPOLIS, MD. 21404

June 3, 1977

Mr. Howard M. Smith, Clerk
Circuit Court for Montgomery County
Court House
Rockville, Maryland 20850

Re: John Franklin Davis Jr.v.Mary Louis Davis
No. 110, September Term, 1976, In the
Court of Special Appeals of Maryland
(No. 150, September Term, 1976, In the
Court of Appeals of Maryland)

Dear Mr. Smith:

We are returning herewith the record in the above captioned appeal which was received by this office from the Court of Appeals of Maryland on June 1, 1977.

Please find enclosed one copy of an Order of this Court, dated June 2, 1977, signed by Chief Judge Richard P. Gilbert, directing that the Mandate of this Court

issued on November 8, 1976, reversing the judgment theretofore obtained in the Circuit Court for Montgomery County be vacated and that the judgment of the Circuit Court for Montgomery County be affirmed; costs to be paid by appellant.

The mandate and a copy of the opinion filed by the Court of Appeals of Maryland are included in the record.

Very truly yours,

//S//
Julius A. Romano
Clerk

JAR:nze
Enclosure
cc: John R. Foley, Esquire (w/copy of Order)
Judson R. Wood, Esquire " " "
Anthony J. Disalvo Schmidt, Esquire
(with copy of Order)

ARTICLE 72A.

PARENT AND CHILD

Sec.
1.Natural guardianship.
2.Right to wages of minors
3.Right to sue for seduction or wrongful injury of minor.
4. (Repealed).

1. Natural guardianship.

The father and mother are the joint natural guardians of their minor child and are jointly and severally charged with its support, care, nurture, welfare and education. They shall have equal powers and duties, and neither parent has any right superior to the right of the other concerning the child's custody. If either the father or mother dies, or abandons his or her family, or is incapable of acting, the guardianship devolves upon the other parent. Where the parents live apart, the court may award the guardianship of the child to either of them. Provided: The provisions

of this article shall not be deemed to affect the existing law relative to the appointment of a third person as guardian of the person of the minor where the parents are unsuitable, or the child's interest would be adversely affected by remaining under the natural guardianship of its parent or parents. (An.Code, 1951, para. 1; 1939, para. 1; 1921, ch. 651, para. 1; 1951, ch. 678.)

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JOHN FRANKLIN DAVIS, JR.	)
CROSS-DEFENDANT	)
v.	) EQUITY NO.
MARY LOUISE DAVIS	) 50391
DEFENDANT and CROSS-PLAINTIFF	)

NOTICE OF INTENT

Clerk:

NOTICE IS HEREBY GIVEN that John Franklin Davis, Jr., complaintant/cross-defendant in the above captioned case, case number 150 in the Court of Appeals of Maryland, hereby says he will file petition to the U.S. Supreme Court for Writ of Certiorari on Decision (s) of the Court of Appeals as Mandated May 31, 1977, which reversed the Decision of the Court of Special Appeals dated October 8, 1976, and said Petition for Writ of Certiorari is taken

pursuant to 28 U.S.C. Section 1257.

Respectfully submitted,

//S//
John Franklin Davis, Jr.
Pro Se

1629 Gamewell Road
Ednor, Maryland 20904

(301) 421-9651

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this NOTICE OF INTENT was sent by first class postage, prepaid to Mr. Judson R. Wood, Esq., 19110 Montgomery Village Avenue, Gaithersburg, Maryland 20760, Attorney for Defendant and Cross-Plaintiff on this 30th day of June 1977.

//S//
JOHN FRANKLIN DAVIS, JR.

IN THE COURT OF APPEALS OF MARYLAND

NO. 150

September Term, 1976

MARY LOUISE DAVIS

v.

JOHN FRANKLIN DAVIS,JR.

APPELLEE'S MOTION FOR RECONSIDERATION OF DECISION

To the Honorable, the Judges of the Court of Appeals of Maryland:

Comes now the Appellee, JOHN FRANKLIN DAVIS, JR., by his attorney, JOHN R. FOLEY and under RULE 850, Maryland Rules Of Procedure respectfully moves the Court to reconsider the decision filed in this cause on April 12, 1977. The grounds in support of this motion are:

1. On April 12, 1977, this Court filed a decision in this cause reversing that entered by the Court Of Special Appeals of Maryland on October 11, 1976 and by its action this Court

affirmed the decision of the Chancellor awarding custody of the parties' eight year old daughter, Katherine Leigh Davis, to Appellant, Mary Louise Davis.

2. The Chancellor, Judge Richard Latham, Montgomery County Circuit Court, on January 5, 1976 had awarded custody of Katherine Leigh to Appellant and the custody of the parties' two older children, John Franklin Davis 3, age 17, and Mary Jane Davis, age 15 to Appellee, John Franklin Davis, Jr.

3. Appellee submits that in its April 12, 1977 affirmance of the Chancellor this Court established a vague new custody test with ominous potential while holding that adultery does not create a "presumption of unfitness" but is merely a "pertinent factor" for custody At page 15 the Court states in its opinion:

" * * that even though Mrs. Davis had engaged in adulterous conduct in the past THERE WAS NO SHOWING THAT IT HAD EVER DELETERIOUSLY AFFECTED LEIGH. * * "

(Emphasis supplied)

4. Apart from the fact that new custody test did not exist at the time of trial of this cause on May 21 and 22, 1975 and on December 11, 1975 and therefore such proof was not then required of Appellee, in establishing this custody standard as of April 12, 1977, the Court did not set "proof guidelines" to be applied by a Chancellor in making a determination as to whether and under what circumstances a "deleterious" effect on the child is derived from the mother's adultery, and in this cast the Appellant's promiscuity.

5. By hypothesis, the non-adulterous Appellee seeking custody now must offer evidence by a psychiatrist, or a social worker, or a

juvenile court representative, or a policeman, or any other qualified person in a position to observe the minor child's behavior and be competent to testify at the custody trial that such child is in some way a "pathological" individual. Proof of "delinquency" would tend to prove that such child had been "deleteriously affected" by the parent's adulterous conduct. However, under the Court's holding such result is not conclusive since the vague new standard requires proof of a connection between the child's pathological condition and the parent's adultery. Such nexus would appear to reside tenuously only in "expert opinion". Nevertheless, the Court's new standard has shifted the focus of attention by the Chancellor from the custodial parent to the child's condition.

6. It appears that the crucial determining custody factor now is the "past conduct" of the

of the child under an adulterous parent's custody rather than the adulterous conduct of the parent. To effect a change in custody from a promiscuous parent as here to the non-adulterous parent, the record now must contain evidence that the child is in need of some type of "remedial treatment" in order to remove the "deleterious" effect brought about in the child by the custodial parent's adultery. Heretofore, the Maryland courts were motivated by a desire to prevent a "delinquent" condition from arising in the minor child by ordering a change in custody to avoid "gambling" on the child's future welfare.

7. The "best interests" of the child test under the Court's April 12, 1977 decision now appears to be the need to effect a "cure" for the child "deleteriously affected" by the parent's adultery, and in this case Appellant's promiscuity. Thus, under this new custody

standard the logical question arises: Where heretofore the parent's "moral corruption" was the test now must the child be proven "corrupted" by the parent's adultery before a change in custody is ordered?

8. The January 5, 1976 order of the Chancellor "split" the custody of the parties' three children. The decision of this Court on April 12, 1977 affirms this result without express consideration of "split custody" principles set forth in earlier cases.

9. At page 10 of its opinion the Court states:

> " * * We now explicity hold * * that whereas the fact of adultery may be a revelant consideration in child custody awards NO PRESUMPTION OF UNFITNESS on the part of the ADULTEROUS PARENT ARISES FROM IT * * "
>
> (Emphasis supplied)

10. Thus the adulterous mother, here a promiscuous mother, is elevated to a plane equal with that of the non-adulterous father, the Appellee, on the question of "fitness" for custody of Leigh. "Promiscuity" where proved as in this case is "relevant" and "pertinent" but not disabling and is on the factor level of "clothing the child properly"; "feeding the child properly"; "visiting the child in school", etc. And the effect is applicable in a "split custody" situation as here.

11. In ROUSSEY v. ROUSSEY 210 Md. 361 123 A 2nd 354, this Court stated at page 355:

" * * Other things being equal, a divided control is to be avoided.* "

In the present case, the promiscuous mother is equal with the non-adulterous father and as pointed out by the Chancellor's statement at page 14 of the Court's opinion all other factors

appear to be equal, thus the condition for applying the "split custody" rule exists in this case. The Court made no reference to it.

12. In none of the decisions relied upon by the Court to reach the result achieved in its decision did a "split custody" situation exist. In PONTORNO v.PONTORNO 257 Md.576,263 A 2nd 820 (1970) two girls, one 3 years old and the other 18 months old, were awarded to the adulterous mother. In NEUWILLER v. NEUWILLER, 257 Md.285 262 A 2nd 736, (1970), a 2 year old son was awarded to the adulterous mother.

13. In the non-Maryland decisions relied upon by the Court did the "split custody" problem exist. In MYERS v. MYERS, Pa. 360 A 2nd 587, (1976) the custody of two girls, one 7 the other age 3 and one-half was awarded to the adulterous mother. In this regard it is significant, however, that the Court there noted

at page 592 that "there was no evidence that Pandora was sexually promiscous.* "

In LOCKARD v. LOCKARD, 193 Nebr. 400, 227 N.W. 2nd 581, (1975) the custody of two minor children was awarded to the adulterous mother. At page 583 the Court stated that the father "acknowledged that he is an alcholic and * * was compelled to admit that (his) second suicide attempt described by the wife did in fact take place, indicating a lack of stability on his part. * *"

In DINKEL v. DINKEL, 322 So 2nd 22. (Fla. 1975) the dispute was over the custody of a 3 year old child. There was no promiscuity proved as the Court stated on Page 23 that "Petitioner (the mother) admitted having sexual relations over a period of time with ONE MAN while she was married to respondent.* *"

14. At page 10 of its opinion the Court refers to "the rapid social and moral changes in our society" as grounds for extinguishing adultery as a "presumption of unfitness" for custody. The cases cited by the Court, nevertheless, appear to distinguish "adultery per se" from "promiscuity per se". No such differentation was made by this Court in reaching its decision here.

15. Finally, the Court elevated the Investigator's Report to the status of "uncontroverted evidence that Mrs. Davis had engaged in no sexual misconduct since February 1975.* " (Page 15 of April 12, 1977 opinion). The source of the February, 1977 time reference was the voluntary statement by Mrs. Davis to the Investigator AFTER the January 10, 1975 pendente lite hearing before the Master. This ex parte proof was not subject to cross-examination by

Appellee and Mrs. Davis at no time at the trial on May 21 and 22, 1975 and December 11, 1975 offered any testimony on her adulterous behavior.

16. It is submitted that the Court erred in holding that this report constituted "uncontroverted evidence" as to when Mrs. Davis ceased her promiscuous conduct.

17. WHEREFORE, the premises considered the Court is respectfully urged:

a. To remand the case to the Chancellor under clear "proof guidelines" to make a determination as to the "deleterious" effect of Appellant's promiscuity on Leigh;

b. To order the Chancellor to apply "split custody" principles in making the award custody; and

c. To order the Chancellor to disregard the Investigator's Report as "uncontroverted evidence" as to when Mrs. Davis ceased her promiscuous behavior.

//S//
JOHN R. FOLEY
9730 Byeforde Road
Kensington, Maryland
Attorney for Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of "APPELLEE'S MOTION FOR RECONSIDERATION OF DECISION" was sent by first class mail, postage prepaid to Mr. ANTHONY SCHMIDT, Esq., 4 Courthouse Square, Rockville, Maryland 20850; and to Mr. JUDSON R. WOOD, Esq., Attorney at Law 19110 Montgomery Village Ave., Gaithersburg, Maryland 20796, Attorneys for Appellant, on this 10th day of May 1977.

//S//
JOHN R. FOLEY,
Attorney for APPELLEE

EXCERPT FROM EQ 50391

December 11, 1975

THE COURT: Gentlemen, I have, of course, heard all of the testimony in connection with the original trial of this case, which consumed a couple of days, and I have had the benefit of our custodial investigation in connection with the three children.

It's obvious to me that Mr. Davis can and has provided an adequate or even more than adequate home for the two older children, and certainly on the basis of their latest report cards, and the custodial investigation report they are doing well with him.

It's equally obvious to me that Mrs. Davis is able to and has been providing an adequate home for the youngest daughter, Leigh. It's quire obvious to me that she would be unable

to remain where she is if the Court awarded her custody of all three of the children, but I don't intend to do that, so it's not necessary to really even discuss that aspect of the case.

The primary concern of the Court in this particular case has been the younger child, Leigh, who has been with her mother, and as to whether that should ba at least a temporary, permanent arrangement, or whether the custody should be changed to the father.

Being aware of the law in referenct to the adultery of the mother and the presumptions that arise from it, at the same time we must consider that the law in the State of Maryland is, and has been for some time, that the best interests of the child is the paramount consideration that the court should consider.

The present situation, obviously whenever a father and mother are divorced, and children are separated, is not very desirable. At the same time, for a substantial period of time, well in excess of a year, the present arrangement has been in effect, and has apparently been working, not to say that if Mr. Davis had had Leigh during that period of time that she might not have made the same progress in school, and in her upbringing as she has with her mother. At the same time, the court, based on all the information in this case, is reluctant at this point to make any change in the custody of Leigh, because I think that that would not be in her best interests.

Now, I am mindful though of the fact that, and as you had indicated, Mr. Foley, this is something that the Court has the right to review, and I would certainly expect to review

it very carefully if at any time any information was brought to the Court's attention that she was, Mrs. Davis was conducting herself in any way that made it inadvisable to keep the custody of Leigh with her.

So, with those brief comments, Mr. Wood, it will be your obligation to prepare the appropriate decree. I'm going to grant custody of the two older children to Mr. Davis, that is John Franklin Davis, and Mary Jane, and the custody of the youngest child, Katherine Leigh, to her mother,now, with the reasonable rights of visitation.....

IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1976

No. 150

MARY LOUISE DAVIS,

Appellant,

v

JOHN FRANKLIN DAVIS, JR.,

Appellee,

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS

APPELLEE'S BRIEF

John R. Foley

630 Washington Building
15th & New York Ave., N.W.
Washington, D. C. 20005

Attorney for Appellee

TABLE OF CONTENTS

minor child into company of the three men with whom evidence proved she committed adultery.

B. When Appellant voluntarily testified in support of her claim to custody of Leigh and was cross-examined, she waived her constitutional privilege against self-incrimination.

C. A constitutional issue should not be considered under Rule 1085 when it is not challanged at the trial court level, is waived, and thus not preserved on appeal.

III. The Court of Special Appeals after reviewing the record exercised its independent judgment as to what is in the best interests of the child and therefore committed no error by overruling the Chancellor and ordering transfer of the child's custody to Appellee, the father, from Appellant, the mother.

TABLE OF CITATIONS

Cases: (continued) PAGE

Treatises:

AMERICAN JURISPRUDENCE 2nd:

IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1976

No. 150

MARY LOUISE DAVIS, APPELLANT

v

JOHN FRANKLIN DAVIS, JR., APPELLEE

ON WRIT OF CERTIORARI TO THE

COURT OF SPECIAL APPEALS

APPELLEE'S BRIEF

STATEMENT OF THE CASE

Appellee, John Franklin Davis, Jr. on September 25, 1974 filed Equity Action No. 50391 in the Circuit Court for Montgomery County, Maryland seeking a divorce a vinculo matrimonii from Appellant, Mary Louise Davis, on the ground

of the latter's adultery. Appellee also claimed custody of the parties' three minor children. In November, 1974, Appellant filed a Cross-bill for a divorce a mensa et thoro and sought custody of the children. A pendente lite hearing was held by a Master in January, 1975. Thereafter Appellee filed a Supplemental Petition alleging additional acts of adultery by Appellant after the date of initiation of this action. Appellant also filed a Supplemental Cross-bill seeking a divorce a vinculo on the ground of voluntary separation for more than one year.

The trial of the cause was held by the Honorable Richard Latham, Judge of the Circuit Court, on May 21 and 22, 1975. By Order dated July 7, 1975 the Chancellor granted to Appellee a di-

vorce a vinculo on the ground of Appellant's adulterous conduct. Judge Latham deferred decision on the custody issue pending receipt of a report from the Court Investigator. On December 11, 1975 the custody hearing was held and by Order dated January 5, 1976 the Chancellor awarded custody of the two older children to Appellee and granted custody of the youngest child, Katherine Leigh Davis, age 8 to Appellant.

Following Appellee's timely appeal, the Court of Special Appeals on October 11, 1976 reversed the Chancellor and awarded custody of Katherine Leigh to Appellee.

(33 Md. App. 295, 364 A 2nd 130, (1976), E-1 to E-8)

This Court on December 30, 1976, granted a Writ of Certiorari upon petition by Appellant, Mary Louise Davis.

The Court ordered Appellant to file her brief no later than January 28, 1977, with Appellee's brief due on or before February 18, 1977.

QUESTIONS PRESENTED

1. .Did the Court of Special Appeals violate Appellant's constitutional privilege against self-incrimination by stating that to retain custody of the minor child proof by Appellant that she "repented" her adulteries was "mandatory"?

11. Did Appellant waive any claim to violation of her constitutional privilege against self-incrimination when she voluntarily testified on the custody issue and was cross-examined?

111. Did the Court of Special Appeals after reviewing the record and exercising its independent judgment as to what is in the best interests of the

child commit error by overruling the Chancellor and ordering transfer of the child's custody to Appellee, the father, from Appellant, the mother?

STATEMENT OF FACTS

The parties were married on September 26, 1958 and thereafter lives in Montgomery County, Maryland up to and during the course of the divorce and custody trials. On January 31, 1974, the Appellant, Mary Louise Davis, left the family home taking with her the youngest child, Katherine Leigh Davis, born March 21, 1968. Appellee filed his divorce action on September 25, 1974 on the ground of Appellant's adulterous conduct and sought custody of all three children. Appellant did not appeal the Chancellor's award of a divorce a vinculo to Appellee July 7, 1975 on the ground of Appellant's

adultery.

The Court of Special Appeals in its opinion rendered October 11, 1976 found that (E-2) "there was strong evidence that Mrs. Davis had committed adultery with three different men on many occasions from June of 1974 until November 30, 1974." It itemized twelve (12) separate adulterous "situations". (E-2 to E-3).

Two of these 'situations" were dated after Appellee had initiated his divorce action on September 25, 1974. These are described by the lower court at page E-3:

> "11) On October 26, 1974, Mrs. Davis and Giovannoni arrived at the latter's apartment at 2:00 a.m. and at 9:30 a.m. Mrs. Davis left:
>
> "12) On November 30, 1974, Mrs. Davis and Giovannoni arrived at his apartment at 2:30 a.m. and at 9:30 a.m. Mrs. Davis left."

Prior to these "situations" Appellant had filed her Answer denying adultery with Mr. Giovannoni. (App-4)

One "situation" not listed by the lower Court occurred on Friday, September 13, 1974. Appellant spent most of that night with Dale Thompson at his home located at 12805 Eckard Lane, Montgomery County, Maryland (T-67-69, 98). While Appellant was engaged with Mr. Thompson, the 8 year old daughter, Katherine Leigh, was being cared for at Appellant's Gaithersburg apartment by the parties' then 14 year old daughter, Mary Jane Davis. (T-172, 201).

The Court of Special Appeals found that at the trials (E-7) "appellee (APPELLANT) failed to discuss in any manner her adulteries or any change in her way of life" and that "where the past indiscretions of the appellee are flagrant it became necessary for her to

demonstrate that the opportunity and privilege of raising Leigh were more important than this *conduct."

ARGUMENT

1.

THE COURT OF SPECIAL APPEALS DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION BY STATING THAT TO RETAIN CUSTODY OF THE MINOR CHILD PROOF BY APPELLANT THAT SHE "REPENTED" HER ADULTERIES WAS "MANDATORY".

At page E-7 of the Appendix to Appellant's Brief, the Court of Special Appeals states:

"** A showing that she had repented and there was little likelihood of a recurrence of these actions was mandatory. We, therefore, find that the chancellor was erroneous in his determination that the best interest of the child required that custody be continued in the mother.*"

At page 4 of her brief, Appellant contends:

"** By applying as the standard for custody, in cases where adultery is shown, the necessity for repentance and

little likelihood of its recurrence, is it is submitted, an abrogation on one's privilege (against self-incrimination)**."
(Underlined portion interpolated)

Appellee asserts that the findings of the Court of Special Appeals and its decision in taking custody from Appellant and awarding the custody of Leigh to Appellee were correct and do not impinge, deny, or in any manner violate Appellant's constitutional privilege against self-incrimination for the following reasons:

A. The lower Court held that to overcome the presumption of her unfitness for custody based on the "overwhelming" evidence of her numerous adulteries required Appellant to prove "repentance".

1. The rebuttable presumption of unfitness for custody that

attached to an adulterous parent may be overcome by proof of that party's repentance.

This Court and the Court of Special Appeals has consistently applied in custody cases a long established principle defined in PALMER v. PALMER, 238 Md. 327, 207 A 2nd 481, (1964) at page 331:

"** If the mother is shown to be an adulteress, a strong presumption arises that she is not a fit and proper person to have custody. To overcome this presumption, a strong showing must be made of facts and circumstances which indicate that the mother is, in fact nevertheless fit and proper. ** Such rules** are based upon the presumption that adultery is a

highly persuasive indicium that the guilty party does not meet the tests, when a choice must be made between parents, of which is the better suited to bear responsibilities of rearing the minor child.**"

Recently the lower Court applied this principle in SARTOPH v. SARTOPH, 31 Md. App. 58, 354 A 2nd 467, (1976) stating through Judge Davidson at page 471:

"** An adulterous parent is presumed to be unfit. The presumption is rebuttable and when rebutted custody may be awarded to the transgressing party. The presumption of unfitness is overcome by a showing that the adulterous party has repented, has terminated the

the adulterous relationship, and has changed his or her errant ways so that there is little likelihood of a recurrence of past indiscreet behavior.**"

The effect of such a presumption of unfitness is described in 29 AM, Jr. 2nd EVIDENCE, Section 165, at page 200:

"** A rebuttable presumption of law is a rule of the substantive law declaring that for procedural purposes a certain prima facie probative force will and shall, until evidence sufficient to prove to the contrary is introduced, be provisionally attached to a given state of facts. The existence of such a presumption is generally held to

impose on the party against whom it is invoked the duty to offer evidence as to the facts, and in the absence of such evidence, the trier of facts is compelled to reach a conclusion in accordance with the presumption.

** The presumption serves a function in allocating or raising the burden of going forward with the evidence, but when the burden is met the existence or nonexistence of the assumed fact must be determined upon the evidence for and against its existence, with no assistance whatsoever from the presumption, because that element of the

assumed fact has dropped from the case.**"

(EMPHASIS SUPPLIED)

2. In Maryland when the presumption of unfitness for custody is not overcome, the Court is compelled to reach a conclution in accordance with presumption.

The cited treatise continued at page

202 "** Some courts take the view, which appears to be gaining adherents, that a rebuttable presumption of law is itself evidence or has evidentiary value. Under this view, the presumption does not disappear the moment evidence contradicting it is received, but the presumption remains in the case to be considered by the jury as evidence, it

> <u>disappears only when the facts upon which it is based have been clearly overcome by evidence to the contrary.**"</u>
> (Emphasis supplied)

Cited by the treatise as applying this principle are <u>GRIER v ROSENBERG, 213 Md. 248, 131 A 2nd 737</u> and <u>MARYLAND USE OF GEILS v. BALTIMORE TRANSIT CO., 329 F 2nd 738</u>, (CA-4)

In this case after Appellee had completed presentation of evidence of Appellant's numerous adulteries the Appellant had certain options as to how she might proceed with her case in chief. She could remain silent on the adultery issue, which she did. Or she could have taken the witness stand to seek to persuade the trial judge that she had changed her immoral manner of living, which she did not do. <u>SARTOPH v SARTOPH</u>, Supra.

At the outset, each parent had the same burden of proving to the Court that he or she was a "fit and proper person" since each sought custody of the children. At the close of the case, Appellant had not rebutted the presumption of her unfitness created by Appellee's evidence. Thus Appellee failed in her proof of fitness. Appellee did not fail.

When the record is studied most sympathetically to Appellant it is found that she made little or no "showing" of fitness. The presumption of unfitness permeated the record and had strong vitality in the Court of Special Appeals. This is the conclusion conveyed by the lower Court by its statement that: "A showing that she had repented** was mandatory. "In effect the said Court said only that what Appellant should have

done at trial to retain custody of Leigh was to try to prove to the chancellor that she had changed from being a "flagrant" adulteress. Since she did not do so, the lower Court exercising its independent judgment held that she was not a "fit and proper person to have custody. Setting forth the results of the Court's evaluation of the evidence and describing the quality of proof required of Appellant to overcome the presumption of her unfitness is not construable as a violation of Appellant's constitutional privilege against self-incrimination.

B. Removal of custody from Appellant for failing to overcome the presumption of her unfitness by proving "repentance" is not a "criminal sanction" violating Appellant's constitutional privilege against self-incrimination since

protection of the interests of the minor child is the primary concern of the Court.

1. The interests of the minor child and not the wishes of a parent govern the Court in making an award of custody.

The lower Court in COOKE v COOKE, 21 Md. App. 376, 319 A 2nd 841, (1974) speaking through Judge Lowe stated at page 843:

"** The 'rights' of the parents are not the issue. They have been overriden by the singular interests of the child which the parents in turn have submerged by their own acts, in a ratio directly proportional to their responsibility for the family's division. The child's best interest, the "cardinal principle'

** is not a 'principle to be placed upon the balance scales' but rather is the measure by which all else is to be decided. No factor will be given weight that is not homogenous with that 'cardinal principle.'**"
(Emphasis supplied)

In reaching the decision the Court made passing reference to the Maryland "Equal Rights Amendment" (ERA), Article 46 of the Declaration of Rights of the Maryland Constitution although "not compelled to do so * * since Appellant neither raised nor argued it.**"

On the status of the child in a custody dispute, 24 AM, Jur. 2nd, DIVORCE and SEPARATION, Section 783, states at page 890:

"** the welfare of the child is the chief consideration. The

dominant thought is that children are not chattels, but intelligent and moral beings, and that, as such, their welfare and their happiness are of first consideration. The welfare of the child is superior to the desires of either parent, indeed, the wishes of the parent are entitled to little, if any, consideration.**"

The treatise cites HILL v HILL, 49 MD. 450 as applying this princple.

In 59 AM. Jr. 2nd, PARENT AND CHILD, Section 32, it states at page 115;

"** The rule that the best interests and welfare of the child govern the right to its custody applies in contests between the father and the mother of the child. A custody dispute between the parents is not con-

sidered an adversary proceeding, and the court acts, not to enforce the adversary rights of the parties, but to protect the interests and general welfare of the child.**"

(Emphasis supplied)

2. A custody action is civil in nature to protect the child thus denial of custody is not a "punishment" inflicted by the court on an adulterous parent losing that custody.

In resolving custody dispute issues, a court makes a determination of which custodian, in the court's best judgment based on the evidence, will protect the interests of the child. The child's future concerns the court as much as the present. Always the criterion is the

welfare of the child.

PALMER v. PALMER, supra states the principle at page 331:

"** Such rules are not to punish a wayward parent nor reward a virtuous one.**"

This Court in SHANBARKER v. DALTON, 251 Md. 256 247 A 2nd 278, (1967) at page 281:

"** In many cases, where a divorce was granted upon the ground of adultery the custody of children of such a marriage has been granted to the innocent party, not as a punishment, but because of an assumption that they will be reared in a cleaner, more wholesome moral surroundings.**"

The situation in MULLINIX v MULLINIX, 12 Md. App. 402, 278 A 2nd 674, (1971)

attorney in a prior criminal case. The Court held at page 7:

> "** (Since) disbarment proceedings are not criminal proceedings** and disbarment is intended not as punishment but as protection to the public, we hold that this proceeding is not a 'criminal case' within the purview of ** the Fifth Amendment to the Constitution of the United States.**"

The protection of a child in a custody case is of equal dignity with "protection to the public" in a disbarment action. A parent, such as Appellant, may exercise the constitutional privilege against self-incrimination in a civil custody action. But the exercise of such right does not thereby create in an adulterous mother a constitutional right to have custody of

resulted in the raining of an issue under ARTICLE 22 of the Declaration of Rights of Maryland that provides: "No man ought to be compelled to give evidence against himself in a criminal case. "The Court observed at page 416:

> "** The instant case, of course, is not criminal in nature.**"
> (Emphasis supplied)

Since a custody proceeding is civil in nature, the question presented involves the use by a party of the constitutional privilege against self-incrimination in such action. In MARYLAND STATE BAR ASSOCIATION INC. v. SUGARMAN, 273 Md. 306, 329 A 2nd 1, (1974), this Court considered the availability in an attorney disarment proceeding of the constitutional protection against self-incrimination under an immunity statue invoked by the

the child.

3. When a parent exercises the constitutional privilege against self-incrimination in a custody action the Court may impose "non-criminal sanctions" and draw inferences adverse to the interests of such parent without violating the constitutional right.

In CONKLING v CONKLING, la. , 185 NW 2nd 777, (1971) the mother, an adulteress, was sued for divorce, but as here, sought custody of the minor children. After she testified on direct examimation she invoked the constitutional privilege against self-incrimination during cross-examination. The trial court upheld the exercise of the right and barred the father's attorney from cross-examination. The appellate court in

holding that it was error to preclude the father from cross-examination, nevertheless sustained the award of custody to the mother. The opinion states at page 784:

"** we, like the trial court, infer from defendant's refusal to answer questions that her answers would be adverse to her. **her conduct in the respects in question was wrongful. Express admissions would be merely cumulative.**"

"**The guilt of a spouse does not forclose the grant of custody to him or her but is a factor to be considered in connection with the welfare of the children.**"

(Emphasis supplied)

In the present case, the lower Court held that Appellant's guilty conduct unrepented was the major factor in removing custody from her. There were no other compensating or redeeming factors in the record of significant import that would guarantee the proper moral upbringing of Leigh.

MAHNE v MAHNE, 66 N.J. 53 328 A 2nd 225, (1974) was a divorce action brought by the husband on the ground of adultery. The wife invoked the constitutional privilege against self-incrimination and refused to answer interrogatories. The trial court struck her answer and counterclaim. This was reversed on appeal as an improper choice of a "non-criminal" sanction. Pertinent statements by the appellate court are:

Page 223: "** While we agree that non-criminal sanctions were per-

missable we reject his choice of sanction.**"

Page 228: "** In a civil case as distinguished from a criminal one, an inference of guilty** may be drawn from his invoking the fifth amendment.**"

Page 229: "** The cited cases serve to illustrate the recognized availability of broad choices of sanctions when dealing with good faith exercises of the privilege in civil litigation.**"

"** The plaintiff has the burden of establishing his charge of adultery**. At the trial the plaintiff will have the benefit of his own showing but also of any inferences to be drawn from the defendant's pretrial testimonial refusals.**"

A similar principle was applied by this Court in ARTHUR & BOYLE v. MORROW BROS., 131 Md. 59, 101 A, 777 where it stated at page 779:

> "** The fact that neither of the Morrows went on the stand is significant and raises a presumption against them **."
>
> (Emphasis supplied)

In the present case, Appellant did not testify on the adultery issue. This fact permitted the lower court to draw inferences adverse to Appellant's custody interests. The adverse inferences support the presumption of unfitness. The said court's indication that for Appellant to discharge her burden of proof to overcome the presumption of unfitness, she should have at the very least "repented" should be appraised with reference to the MULLINIX solution. The

court compelled action by the adulterous mother and her paramour. The court enjoined the adulterous parties from meeting, under paid of contempt citation and its train of consequences. This compulsion was applied even though the lower Court acopted the finding of the chancellor at page 409 that:

> "** There is no suggestion in this case that Mrs. Mullinix is a wanton woman, that she is promiscuous, that she is flagrant in adultery.*"
>
> (Emphasis supplied)

By contrast, the same Court found that Appellant is "an unrepentant, flagrantly adulterous and promiscuous parent." (E-8) Appellant is what Mrs. Mullinix was not.

The challenged statement of the lower Court that the adverse inferences drawn against Appellant in support of the pre-

sumption of unfitness made "mandatory" proof by her of "repentance" is within the principles set forth above.

That invocation of the constitutional privilege against self-incrimination in a civil action may subject a party to a "non-criminal sanction" without violating the right, and also permits the Court to draw inferences adverse to such party based upon the exercise of the right suggest that the lower Court's statement of "mandatory" repentance" by Appellant is within the ambit of authorized adverse inference, falls far short of a permissible "non-criminal sanction", and does not violate Appellant's constitutional privilege.

Accordingly, the decision of the Court of Special Appeals in removing

custody from Appellant and awarding custody of Leigh to Appellee should be affirmed.

II.

APPELLANT WAIVED ANY CLAIM TO VIOLATION OF HER CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION WHEN SHE VOLUNTARILY TESTIFIED ON THE CUSTODY ISSUE AND WAS CROSS-EXAMINED.

A. Appellant admitted on cross-examination that she took the minor child into the company of the three men with whom evidence proved she committed adultery.

At the trial in May, 1975 Appellant voluntarily testified on her own behalf. (APP167) When Appellee's attorney asked her on cross-examination:

> (APP-175) "Can you tell his Honor whether you had either Leigh, or whether you had Mary Jane with you when you were in the company of men other than your husband?"

Appellant's attorney objected but was overruled by the chancellor who stated:

(APP-175) "I think that that's a proper question, Mr. Wood, as to the custodial issue only, and I will permit it on that issue."

Appellant's response to the question was: "Yes sir".

Cross-examination elicited from Appellant admissions that she had taken the child Leigh into the company of the three men involved in her adulteries. Appellee's quality of proof of those adulteries was appraised by the chancellor as "overwhelming". (APP-205) It should be pointed out that the instances when Leigh was with the three men were not the instances when adultery was committed by Appellant. However, Leigh was brought by Appellant into the physical presence of the three men involved. However, Appellant offered her testimony after Appellee had presented to the chancellor the proof of

numerous adulteries upon which Appellee was granted a divorce a vinculo from Appellant.

Appellant's direct examination did not address itself to the adultery evidence of Appellee. Rather, Appellant confined herself to the custody issue. But on this issue, she did not deny, she did not explain, and she did not "repent" her adulteries.

Moreover, during her cross-examination she did not invoke the constitutional privilege against self-incrimination.

B. When Appellent voluntarily testified in support of her claim to custody of Leigh and was cross-examined, she waived her constitutional privilege against self-incrimination.

That a witness in a divorce action

alleging adultery is entitled to invoke the constitutional privilege against self-incrimination was recently restated in PAYNE v. PAYNE, 33 Md. App. 707, 366 A 2nd 405, (1976). But this Court has held that a party in a civil action can waive this constitutional protection. In RODDY v. FINNEGAN, 43 Md. 490 (1876) the Court states at page 502:

> "** The witness ordinarily has the privilege of declining to answer a question that might subject him to criminal prosecution but this he can waive. It is the privilege of the witness not of the party. Where he is both party and witness for himself he must be held on his cross-examination as waiving the privilege as to any matter about

> which he has given testimon-in-chief. Having testified to a part of the transaction in which he was concerned, he is bound to state the whole.*"
> (Emphasis supplied)

Years later the U. S. Supreme Court applied the same principle in a civil action, BROWN v. U. S. 356 U.S. 148, 78S. Ct. 622, 2 L. Ed. 2nd 589, (1958) 72 ALR 2nd 818. This holding was applied in both (CONKLING v CONKLING AND MAHNE v. MAHNE, supra.

The extent of this waiver was defined in ALLEN v. STATE, 183 Md. 603, 39A 2nd 820 (1944) at page 612:

> "** While this constitutional guaranty against compulsory self-incrimination is a time-honored one and jealously guarded by the courts against violation, it is also one which,

like all other privileges, may be waived. One way of doing this is for the accused to voluntarily take the witness stand in his own behalf. If he does so, he waives the privilege, not only as to any matter about which he has given testimony in chief, but also concerning any matter pertinent to the issue on trial, regardless of the extent of the direct examination: nor can he then refuse to testify to any fact which would be competent in the case if proved by any other witness.**"

(Emphasis supplied)

In the present case, Appellant limited herself to testifying voluntarily to the custody issue only. However the waiver of her constitutional privilege against

self incrimination embraces also the adultery issue about which she did not testify.

The lower Court made an extensive in depth review of the constitutional protection against self-incrimination in STATE v. MCKENZIE, 17 Md.App. 563, 303 A2nd 406, (1973) That treatise states at page 572:

"** The defendent who takes the stand of his own free will subjects himself to the risk of future cross-examination by the prosecuting attorney or by the court, a stage at which the element of compulsion does attach. **Although the waiver is unnecessary for the voluntary direct examination itself, it must nevertheless be resolved on an anti-

cipatory basis before the direct examination begins. The defendant, in effect waives the privilege against compulsory self-incrimination nunc pro tunc. ** A defendant need not waive anything in order validly to testify; he only waives the right against later compulsory cross-examination.**"

Page 574: "** Indeed, the voluntary assumption of the witness stand by the accused to testify in his own defense, is, ipso facto, all the waiver that is required of the privilege against subsequent cross-examination, to wit, against compulsory self-incrimination.**"

Appellant's action in testifying on

her own behalf on the custody issue and being cross-examined constituted a waiver of her constitutional privilege against self-incrimination. Thus, the Court of Special Appeals could not have violated that constitutional right of Appellant as she now asserts.

Moreover, it has been held that where a constitutional issue has not been asserted at the trial court level it is not preserved on appeal.

C. A Constitutional issue should not be considered under RULE 1085 when it is not challenged at the trial court level, is waived, and thus not preserved on appeal.

This Court has consistently refused to consider a constitutional issue that was not presented at the trial court level. In the present case, it is true that what is being attached is a statement by the

Court of Special Appeals. However, in view of Appellant's waiver at the trial court level, the issue asserted by her now should not be considered under RULE 1085, Maryland Rules of Procedure. ANDRESEN v. BAR ASSOCIATION OF MONTGOMERY COUNTY, 269 Md. 313, 305 A 2nd 845, (1973): MINNER v. MINNER, 19 Md. App. 154, 310 A 2nd 208, ( ).

III.

THE COURT OF SPECIAL APPEALS AFTER REVIEWING THE RECORD EXERCISED ITS INDEPENDENT JUDGMENT AS TO WHAT IS IN THE BEST INTERESTS OF THE CHILD AND THEREFORE COMMITTED NO ERROR BY OVERRULING THE CHANCELLOR AND ORDERING TRANSFER OF THE CHILD'S CUSTODY TO APPELLEE, THE FATHER, FROM APPELLANT, THE MOTHER.

Appellant asserts at page 6 of her brief that the lower court "erred in overruling the factual conclusion of the Chancellor." Further, Appellant states that the "Court of Special Appeals fact-

ual finding of the Chancellor (E-3) and reversed the custody placement of the young child with her mother**."

Appellee contends that the lower Court applied the rule defining the scope of appellate review in a custody case as stated in SULLIVAN v. AUSLAENDER, 12 Md. App. 1, 276 A. 2nd 698 (1971) at page 4:

> "** For we must accept the chancellor's factual findings and his view of the evidence, IF NOT CLEARLY WRONG, and, having so accepted them WE MUST EXERCISE OUR BEST JUDGMENT, just as when the facts were undisputed, in determining whether THE CONCLUSION THE CHANCELLOR REACHED ON THOSE FACTS WAS THE BEST ONE.*"
> (Emphasis supplied)

The lower Court made specific reference to this rule in its opinion at page E-5:

> "** In SULLIVAN v. AUSLAENDER, 12 Md. App. 1, 276 A 2nd 698 (1971) this Court carefully reviewed the decisions of the Court of Appeals and determined that in making this determination an appellate court is not bound by the clearly erroneous rule, Md. Rule 1086, but must exercise its own good judgment as to whether the CONCLUSION of the chancellor is the best one. In making this determination, WE, OF COURSE, ACCEPT THE CHANCELLOR'S FACTUAL FINDINGS, BUT NOT NECESsarily his conclusions.**"
> (Emphasis supplied)

After following the appropriate guidelines and reviewing the evidence, the

lower Court dismissed the assertion by Appellant that the passage of time from November of 1974 when the "last adultery shown by the record occurred" and the holding of the custody hearing on December 11, 1975 "alone showed that the relationships have been terminated" by this statement:

> (E-7). "We do not view the evidence in that manner. **It seems apparent to us that the appellant (APPELLEE) after having overwhelmingly demonstrated the wife's wayward manner could rely on the fact that it would be up to her to show a change in the course of her conduct, indeed, the cases place such burden on the adulterous parent. ** We note that in her testimony the appellee (APPELLANT) failed to discuss in any

manner her adulteries or any change in her way of life. In a situation as we have here where the past indiscretions of the appellee (APPELLANT) are flagrant IT BECAME NECESSARY FOR HER TO DEMONSTRATE THAT THE OPPORTUNITY AND PRIVILEGE OF RAISING LEIGH WERE MORE IMPORTANT THAN THIS TYPE OF CONDUCT.

A showing that she had repented and there was little likelihood of a recurrence of these actions was mandatory.**"

(Emphasis supplied, Interpolations made)

That the evidence was throughly reviewed is indicated by the Court's itemization of twelve (12) separate adulterous situations set out in its opinion of pages E-2 and E-3. It is therefore arguable that not only did the Court of Special Appeals exercise its independent judgment to find and hold that the Chancellor's "conclusion" as to custody was

erroneous but also that under RULE 1086 the trial court's judgment was "clearly erroneous" on "both the law and the evidence". However, it appears that the lower Court did not go beyond the exercise of its independent judgment and in addition a reverse the Chancellor under RULE 1086 for it states at E-7:

"**We, therefore, find that the chancellor was erroneous in his determination that the best interest of the child required that custody be continued in the mother.**"

Accordingly, the decision of the Court of Special Appeals should be sustained by this court.

Respectfully submitted,

JOHN R. FOLEY,
9730 Byeforde Road
Kensington, Md. 20795
Attorney for Appellee

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JOHN FRANKLIN DAVIS, JR. :

Plaintiff and :
Cross-Defendant :

vs. : Equity No. 50391

MARY LOUISE DAVIS, :

Defendant and :
Cross-Plaintiff :

ORDER AND DECREE

This cause having been heard by this Court on the 21st and 22nd days of May, and December 11, 1975; and both parties being present and represented by counsel; this Court after careful consideration of the evidence,

IT IS, THEREFORE, this 5th day of January, 1976 ORDERED AND DECREED: by the Circuit Court for Montgomery County;

1. That the defendant, Mary Louise Davis, be awarded the custody of the minor child of the parties, namely, Katherine Leigh Davis,

with reasonable rights of visitation reserved to the plaintiff, John Franklin Davis, Jr.

2. That the custody of the two minor children of the parties, namely, John Franklin Davis, III and Mary Jane Davis, be awarded to the plaintiff, John Franklin Davis, Jr. with reasonable rights of visitation reserved to the defendant, Mary Louise Davis.

3. That the plaintiff, John Franklin Davis, Jr. shall pay to the defendant, Mary Louise Davis, $175.00 per month for the support and maintenance of the minor child of the parties, namely, Katherine Leigh Davis.

//S//
RICHARD B. LATHAM,
JUDGE of the Circuit
Court for Montgomery
County, Maryland

Approved as to form and content:

//S//
JUDSON R. WOOD
Attorney for Defendant and
Cross-Plaintiff

//S//
JOHN R. FOLEY
Attorney for Plaintiff and
Cross-Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition titled "On Petition for Writ of Certiorari from the Court of Appeals, State of Maryland", with appendix, was mailed first class mail, postage prepaid, this 12th day of September, 1977, to Judson R. Wood, Esq., 19110 Montgomery Ave., Gaithersburg, Maryland - 20760.

John F. Davis, Jr.

STATE OF MARYLAND
COUNTY OF MONTGOMERY

Signed before me this 1st day of Sept, 1977.

Edward A Marum
NOTARY PUBLIC

My commission expires 7/1/78.

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